BILL OF EXCEPTIONS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 230.

CHARLES E. YATES ET AL., PLAINTIFFS IN ERROR,

vs.

JONES NATIONAL BANK.

No. 231.

CHARLES E. YATES ET AL., PLAINTIFFS IN ERROR,

vs.

UTICA BANK.

No. 232.

CHARLES E. YATES ET AL., PLAINTIFFS IN ERROR,

vs.

THOMAS BAILEY.

No. 233.

CHARLES E. YATES ET AL., PLAINTIFFS IN ERROR,

vs.

BANK OF STAPLEHURST.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MARCH 20, 1906.

(20,139, 20,140, 20,141, 20,142.)

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1 In the District Court of Seward County, Nebraska.

THE JONES NATIONAL BANK
v.
CHARLES W. MOSHER ET AL.

THE UTICA BANK
v.
CHARLES W. MOSHER ET AL.

THOMAS BAILEY
v.
CHARLES W. MOSHER ET AL.

THE BANK OF STAPLEHURST
v.
CHARLES W. MOSHER ET AL.

Bill of Exceptions.

(Stamped:) Filed Sept. 24" 1902. J. M. Calder, Clerk of District Court.

2-7 Appearances.

For plaintiffs: J. J. Thomas, R. S. Norval, L. C. Burr.
For defendants: J. W. Deweese, C. O. Whedon, H. F. Rose.

Trial had before Hon. S. H. Sornborger, one of the Judges of the District Court of Seward, Nebraska, and a jury May 28th, 1902, being one of the days of the regular May 1902 term of said district court.

This Bill of Exceptions proposed by the defendants.
O. P. HEALD, *Reporter.*

8 *Testimony on Behalf of Plaintiffs.*

AUGUSTUS D. LYNCH, called on behalf of the plaintiffs, and being first duly sworn testified as follows:—

Direct examination.

By Mr. NORVAL:

Q. Where do you reside, Major?
9 A. Washington, D. C.
Q. How long have you resided there?
A. Near seventeen years.
Q. What official position, if any, do you hold in connection with the Comptroller of the Currency, and the Treasurey department of the United State?

A. I am Chief, in the division of "Insolvent National Banks."

Q. And as such officer, are you familiar with the records of that office, and the manner of keeping them?

A. Yes, I am.

Q. You may state if you have with you, in your official capacity, any of the records pertaining to the office of the Comptroller of the Currency.

A. I have.

Q. Will you produce them?

(Witness complying, produces a bundle of papers.)

Q. You may state by what authority, or by whose directions, the documents which you have produced were brought from the department.

10 A. By authority of William B. Ridgeley, Comptroller of the Currency.

Q. And for what purpose and object?

Q. What was the occasion?

Q. When were they brought from Washington, and in whose custody have they been since that time?

A. I left there yesterday a week ago, and they have been in my custody ever since.

Q. And from whom did you receive them, and where did you receive them?

A. By direction of the Comptroller of the Currency I took them from the files of the office.

Q. And brought them here with you?

A. I did.

Q. And kept them in your possession until this time?

A. I have.

Q. And are they a part of the files and records in the office of the Comptroller of the Currency?

A. They are.

The following Exhibits identified.

Nos. 942 to 948 both inclusive. And Nos. 958 to 971 both inclusive.

Nos. 972 to 976 both inclusive.

Q. I now hand you Major Lynch exhibits 942–943 and

11 944 and ask you if they are a part of the files and records of the office of the Comptroller of the Currency at Washington.

A. They are. They were taken in this manner from the files, just as shown here.

Q. And brought by you from there, and have been since in your possession?

A. Yes sir.

Q. I now hand you exhibits 949 to 959 inclusive, and will ask you to state if they are a part of the files and records of the office of the Comptroller of the Currency at Washington, D. C.?

A. Yes they are a part of the files of the Report Division.

Q. And they were brought by you from Washington and have

been in your custody ever since as the custodian of papers for the Treasury department?

A. They have been in my possession.

Q. And are still in your possession as such.—I now hand you papers marked Exhibits No. 960 to 971 inclusive, and will ask you to state if they are a part of the records and files of the office of the Comptroller of the Currency at Washington, D. C.

A. They form a part of the papers, they were in an envelope marked with a private mark.

Q. They are a part of the files, documents and records of the office of the Comptroller of the Currency?

A. Yes sir. (Witness indicates private mark on envelope.)

Q. And they were brought by you from the department of the Comptroller of the Currency to this City last week, and have since been in your possession and under your control, and in your custody?

A. They have.

Q. I now hand you exhibit No. 972, and will ask you if that is a part of the records and files of the office of the Comptroller of the Currency at Washington, D. C.?

A. It is yes sir.

Q. And the same is in your custody as stated in reference
12 to the other papers.

A. Yes sir.

Q. You may state Major Lynch, if you know what has become,—or whether or not the proofs of publication of the statements that were made by the Capital National Bank prior to 1892 are in the Comptroller's office at Washington, or what has become of them.

A. They could not be found, and there is a rule of the office, of the bureau fixed by Col. Tren, when he was Comptroller, that after five years the published statements might be destroyed, on account of the space they took in the vaults, and he issued an order that they might be destroyed, and they are not in the files.

Q. And that has been the custom ever since?

A. Yes sir.

Q. And you have made diligent search through the files and they could not be found?

A. No sir. That is the rule of the office, the Comptrollers regarded it as a departmental rule, but it was made by the Comptroller. There is an affidavit of the File Clerk, specially made, I don't know as it enters into it, but he makes that verification.

By Mr. WHEEDON:

Q. You say you made a search for the papers, or did you rely upon that rule that they were destroyed?

A. No the file clerk make an examination, who is charged with these publications. I also looked in the files.

Q. Did you make search for them?

A. Yes sir.

By Mr. DEWEESE:

Q. I will ask you whether you came here and brought these papers at the request of the plaintiff in this action?

A. The circumstances, as I understand are these. Mr. Jones addressed a letter to the Comptroller of the Currency and requested certain papers to be sent here, or to him, in such manner as was proper, and the Comptroller upon his request sent them, and desig-
nated me as his representative, the representative of the
13 comptroller.

Q. You came here at their expense?

A. I did. The money was paid to the Comptroller. The office pays my expenses. They go into the Comptroller's hands and not mine.

Q. You spoke of Jones, is that Jones of the Jones National Bank?

A. President of the Jones National Bank.

By Mr. NORVAL:

Q. Who sent you here to represent him?

A. The Comptroller of the Currency sent me here to present these papers to the court.

Q. As a representative of what department?

A. I came as the chief of the Insolvent division, and known as the Currency bureau of the Treasury department.

Q. Is that connected with the Comptroller of Currency?

A. The Comptroller is the Chief or head of the Currency bureau.

Q. Of the Treasury department?

A. Of the Treasury department.

Q. And you came as his representative?

A. I did.

Q. Representative of that department?

A. Yes sir.

Mr. NORVAL: That is all.

Witness excused.

* * * * * * *

14 Exhibit No. 942 received and read in evidence, as follows:

"Office Comptroller of Currency, Feb. 27, 1892.

LINCOLN, NEBR., *Feb.* 23, 1892.

E. S. Lacey, Washington, D. C.

DEAR SIR: Your letter of Feb. 15/92 received and considered. The manner of conducting the Capital Nat. Bank of Lincoln,
15 Nebr., for a length of time has not been satisfactory to me.

I have had a talk with C. W. Mosher and R. Outcalt, president and cashier on the subject and they promise that the management of the bank shall be improved. I think I can promise you there will be better management. Your letter is a move in the right direction, it indicates that we the directors should take a more positive position in the management which I for one shall do.

Resp. &c., E. P. HAMER.

Exhibit 334.
Exhibit 942, O. P. H."

Exhibit 943 received and read in evidence, being as follows:

"C. W. Mosher, Prest. #2988. H. J. Walsh, Vice Prest. R. C. Outcalt, Cashier.

Office Comptroller of Currency, Oct. 14, 1892.

Capital National Bank.

Capital $300,000.

16 LINCOLN, NEB., *Sept.* 19, 1892.

To the Comptroller of the Currency, Washington, D. C.

DEAR SIR: In reply to your favor of Aug. 31, 1892 would state that we fully answered you in Feb. last as regards the Mosher & Small loans, & am now making good progress towards cutting those items down to the limit.

As regard the Real Estate mortgages that is a part of the Small matter & both will be cleaned up at the same time. The dividend of July 1st was al-right; The expenses since then have exceeded income by reason of having paid taxes, & interest on certificates of deposits to an unexpected amount during July. The item of $8000.00 losses referred to was an estimate of contingent losses & *an* not any particular loss already incurred, but referred to some matters or process of liquidation, all items mentioned by you shall receive prompt attention.

Yours truly,
(Signed) C. W. MOSHER.
R. C. OUTCALT, *Cashier.*
D. E. THOMPSON.
E. P. HAMER.
A. P. S. STUART.
R. O. PHILLIPS.
C. E. YATES.

Exhibit 335.
Ex. 943. O. P. H."

17 Exhibit No. 944 received and read in evidence as follows:

2988.

Office Comptroller of Currency, Feb. 23, 1892.

LINCOLN, NEB., *Feb. 19th,* 1892.

To the Hon. Comptroller of the Currency.

DEAR SIR: Referring to your letter of 16th to Mr. C. W. Mosher, President, we would say in regard to the item 50950.28 E. W. Mosher, that this am't appears on the books to be a loan to him endorsed by C. W. Mosher and secured collaterally by notes of many

individuals in smaller am'ts aggregating the same am't made to E. W. Mosher.

The facts are that this account is made up with small notes taken in a territory from which comes the best products of the state, and considered a good field for a line of loans & E. W. Mosher was authorized to get good paper of this character for the bank, and such notes being made in the name of E. W. Mosher.

The officers of the bank requiring a guaranty of his discretion took the notes of E. W. Mosher which have been endorsed by C. W. Mosher making the notes of smaller am'ts collateral, thus making fewer a/cs to handle, but unfortunately losing sight of the requirements of Sec. 5200 touching limits of am't which we may simply say ought not to have been done and the matter has now received the attention of the Directors through instructions to place the whole matter in technical as well as financially proper shape as quickly as it may be done without loss.

The J. W. Small 51752.53. This was originally a note given by the Fairfield Exchange Bank of Fairfield, Neb., for $20250.00 at the time secured by collateral notes. In course of time the loan was found to be weak and Prest. Mosher took additional security in shape of second mortgages on real estate, a lot of live stock &c. Mr. Small's bank and his own affairs fell into hard lines and failed in both respects.

The officers of the bank meanwhile had paid off first mortgages in the real estate to the amount of some $31000 to make better the bank security. Other creditors of Small attacked the position of the bank as holding excessive security which resulted in litigation still unsettled, but through which the claims of this bank against some 2700 acres of land has been declared a first lien. And it seems certain that the claim will be fully realized or at farthest only a small loss can follow. The excessive am't of the a/c comes of erroneously charging the am'ts paid for raising liens on the real estate in same a/c instead of a special a/c therefor.

18 In regard to overdrafts. Since the examination this matter has had close attention and has been reduced to 13,537.84 at this date, and should have never been permitted in as much as the records of the bank will show specific instruction to the officers by resolution of the directors not to allow overdrafts.

Over due papers. Instructions have been made to the officers to give both close attention and continuous efforts to correct this condition. It will be remembered, however, that the J. W. Small a/c constitues a part of this amt. which will hold a considerable sum in that condition until pending litigation is concluded.

Discount Committee. The bank has always had a discount committee but about a year since Mr. W. W. Holmes died suddenly & left only one member. The place has now been supplied by the appointment of Mr. E. P. Hamer. The Com. now being A. P. S. Stewart & E. P. Hamer.

Rediscounts. These have been cut down since examination from 137234.16 to 50844.14 and will probably be reduced considerably the coming three months. This condition was not taken on for

the purpose of increased business but to meet falling off in deposits from which all western banks suffered on account of the drouth of 1890.

It is the desire of the directors that the standing of this bank should in all respects be upon perfect footing in the Department and will at all times be pleased to have notification of any apparent neglect.

Yours Resp'y

C. W. MOSHER, *Pt.*
C. E. YATES, *Director.*
R. O. PHILLIPS, *Director.*
D. E. THOMPSON, *Director.*
A. P. S. STUART, *Director.*
E. P. HAMER, *Director.*
R. C. OUTCALT, *Director.*

Exhibit 333.
Exhibit 944 O. P. H."

(Said exhibit being endorsed as follows,—)
File No. — C. No. 2988. From Capital Nat'l Bank, Lincoln, Nebr. Date, Feb'y 19", 1892. Subject—Explaining loans, &c. Answered. Answered by —— Division.

19 Exhibit No. 960 received and read in evidence being as follows:—

"Office of Comptroller of Currency.

Organization.—Form 3.—Ed. 7, 5, '98, 4,500.

Oath of Directors.

STATE OF NEBRASKA, *County of Lancaster, ss:*

We the undersigned Directors of The Capital National Bank of Lincoln in the state of Nebraska being citizens of the United States, and residents of the state of Nebraska do each for himself and not one for the other, solemnly swear that we will severally, so far as the duty devolves on us diligently and honestly administer the affairs of said Association; and that we will not knowingly violate, or willingly permit to be violated, any of the provision- of the Statutes of the United States under which said Association has been organized; and each for himself does solemnly swear that he is the owner in good faith, and in his own right, of the number of shares of stock required by said Statutes, subscribed by him or standing in his name on the books of the said Association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt.

Name.	Residence and Post-office Address.
1. C. W. Mosher	Lincoln, Nebr.
2. R. C. Outcalt	"
3. E. P. Hamer	"
4. R. O. Phillips	"
5. A. P. S. Stuart	"
6. D. E. Thompson	"
7. C. E. Yates	"

On this 8 day of February, A. D. 1892, before me a Notary Public in and for the state and county aforesaid appeared C. W. Mosher, R. C. Outcalt, E. P. Hamer, R. O. Philips, A. P. S. Stuart, D. E. Thompson, and C. E. Yates, who are personally well known to me, and took the foregoing oath and each subscribed the same in my presence.

[SEAL.] HAL. C. LONG,
Notary Public.

NOTE.—Each director when elected must take the oath of office and under section 5147 E. S. R. S., it should be transmitted to the Comptroller of the Currency immediately after the election, etc.

Ex. 960. O. P. H."

20 (Endorsed on back is the following:) "No. 2988. Oath of Directors of The Capital National Bank of Lincoln, Nebraska.
1892.

Exhibit No. 961 received and read in evidence, being as follows:—

"Office Comptroller of Currency.

Organization.—Form 3.—Ed. 7, 5, '98, 4,500.

Oath of Directors.

STATE OF NEB., *County of Lancaster, ss:*

We, the undersigned Directors of "The Capital National Bank" of Lincoln in the State of Nebraska, being citizens of the United States, and residents of the State of Nebr. do each for himself and not one for the other, solemnly swear that we will severally, so far as the duty devolves upon us, diligently and honestly ad-
21–35 minister the affairs of said Association; and that we will not knowingly violate, or willingly permit to be violated, any of the provisions of the Statutes of the United States under which said association has been organized; and each for himself does solemnly swear that he is the owner in good faith, and in his own right, of the number of shares of stock required by said statutes, subscribed by him or standing in his name on the books of the said Association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt.

Name.	Residence and Post-office Address.
1. C. W. Mosher	Lincoln.
2. A. P. S. Stuart	"
3. W. W. Holmes	"
4. D. E. Thompson	"
5. R. O. Phillips	"
6. C. E. Yates	"
7. E. P. Hamer	"

On this 4 day of March A. D. 1891, before me a Notary Public in and for the state and county aforesaid, appeared C. W. Mosher, A. P. S. Stuart, W. W. Holmes, D. E. Thompson, R. O. Phillips, C. E. Yates, and E. P. Hamer, who are personally well known to me, and took the foregoing oath, and each subscribed the same in my presence.

[SEAL.] J. W. MAXWELL,
Notary Public.

NOTE.—Each Director when elected must take the oath of office and under section 5147 U. S. R. S., it should be transmitted to the Comptroller of the Currency immediately after the election. etc.

Ex. No. 961.—O. P. H.

(The following endorsement appears on the back thereof.)
No. 2988 Oath of Directors of The Capital N. B. of Lincoln, Neb. 1891.

* * * * * * *

36 *Oath of Directors.*

STATE OF NEBRASKA, *County of Lancaster, ss:*

We, the undersigned, Directors of The Capital National Bank, of Lincoln, of the State of Nebraska, do each of us solemnly swear that we are citizens of the United States, and residents of the State of Nebraska, and that we will severally, so far as the duty devolves on us, diligently and honestly administer the affairs of said Bank; and that we will not knowingly violate, or willingly permit to be violated, any of the provision of the Revised Statutes of the United States under which this Bank has been organized; and that each of us is the *bona fide* owner, in his own right, of the number of shares of stock subscribed by him or standing in his name on the books of the said Bank, and required by said Revised Statutes; and that the same is not hypothecated, or in any way
37 pledged as security for any loan or debt.

A. P. S. STUART.
D. E. THOMPSON.
C. E. YATES.
E. P. HAMER.
W. W. HOLMES.
R. O. PHILLIPS.
C. W. MOSHER.

Subscribed and sworn to this 26 day of June, 1884, before the undersigned, a Notary Public of said County.

R. C. OUTCALT,
[SEAL.] *Notary Public.*

* * * * * * *

38 Exhibit No. 971 received and read in evidence, as follows,—

* * * * * * *

39 Mr. NORVAL: I now offer in evidence Exhibit No. 972.

* * * * * * *

Exhibit No. 972, received and read in evidence, as follows,—

40–51 Enter Charter number of Bank here.

Bank Officers are requested to use the following form for printer's "copy."

No.—.

Report of the Condition of The Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, 9th Dec. 1892.

Resources.

Loans and Discounts	$768,601.44
Overdrafts, secured and unsecured	6,217.74
U. S. Bonds to secure circulation	50,000.00
U. S. Bonds to secure U. S. Deposits	
Current expenses and taxes paid	14,286.28
Premiums on U. S. Bonds	
Stocks, securities, etc	325.00
Banking house, furniture, and fixtures	5,770.00
Other real estate and mortgages owned	38,617.92
Due from National Banks (not reserve agents)	17,800.33
Due from State Banks and Bankers	5,394.72
Due from approved reserve agents	107,090.01
Internal-Revenue Stamps	
Checks and other cash items	3,698.56
Exchanges for clearing house	8,841.16
Bills of other Banks	2,355.00
Fractional paper currency, nickles, and cents	298.71
Lawful Money Reserve in Bank, viz.:	
Specie	26,789.50
Legal-tender notes	17,431.00
Redemption fund with U. S. Treasurer (5% of circulation)	1,350.00
Due from U. S. Treasurer, other than 5% redemption fund	
Total	1,074,867.37

Liabilities.

Capital stock paid in		300,000.00
Surplus-fund		6,000.00
Undivided profits, less expenses and taxes paid		21,180.75
National Bank notes outstanding		45,000.00
State Bank notes outstanding		
Due to other National Banks	81,574.14	
Due to State Banks and Bankers	47,372.89	643,632.24
Due to Trust Companies and Savings Banks		
Due to approved reserve agents		
Dividends unpaid		
Individual deposits subject to check	356,139.33	
Demand certificates of deposit	158,545.88	
Time certificates of deposit		
Certified checks		
Cashier's checks outstanding		
United States deposits		
Deposits of U. S. disbursing officers		
Notes and bills rediscounted		59,054.38
Bills payable, including certificates of deposits for money borrowed		
Liabilities other than those above stated		
Total		1,074,867.37

STATE OF NEB., *County of Lancaster, ss:*

I, R. C. Outcalt, Cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15 day of Dec., 1892.

HAL C. YOUNG,
Notary Public.

Correct.
Attest: C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,
Directors.

Ex. 972.
O. P. A.
Ex. A. 972.

M. D. CAREY,
Notary Public.

Blank items need not be published.

NOTE.—The banks are respectfully notified that by law their published reports must be copies of the originals; and they must therefore state separately the amount of deposits subject to check, of demand and time certificates of deposit, and of certified checks

and cashier's checks outstanding. Certificates of Deposit representing money borrowed must be included in and published as Bills Payable. Failure to do this may subject a bank to the expense of republication.

Publishers' Certificate.

Enter Charter Number of Bank here.

No. 2988.

Please observe the following requirements:

Cut the printed Report from the Newspaper and attach here.

I. Each National Bank report must be published in a newspaper in the place where the bank is established; or if there be no newspaper in the place, then in the one published nearest thereto in the same county.

II. It must be published in the same form, and the same order of items as in the sample form on the back of this certificate, including the full title and location of bank, the affidavit of cashier, the notary's certificate, and the attestation of at least three directors.

III. Items which remain blank in the original may be omitted from the printed report, but the publication must never be condensed by combining two or more items into one.

IV. The original report should not be delivered on account of publication, but should be forwarded at the earliest moment possible, and the published report can follow at a later date. The form herewith can be used to furnish "copy" for the printer.

(See sections 5211 and 5213, U. S. R. S.)

Paste so that No Part can be Torn Away.

STATE OF NEBRASKA, *County of Lancaster, ss:*

On this 17th day of December, A. D., 1892, personally appeared before the undersigned, a Notary Public within and for said county and State, —— ——, publisher of the Nebraska State Journal, a daily newspaper published at Lincoln, County of Lancaster, State of Neb., who being, duly sworn, states on oath that the Report of "The Capital National Bank" of Lincoln, in the State of Neb., a true copy of which is hereto annexed, was published in said newspaper in its issue of the 17th day of Dec. A. D. 1892.

H. D. HATHAWAY, *Publisher.*

See Sample Form on back of this Certificate.

Subscribed and sworn to before me this 17th day of December, 1892.

W. A. WILLIAMS,
Notary Public.

Forward Certificate to Comptroller of Currency as promptly as possible.

* * * * * * *

52 Exhibit No. 975 received and read in evidence being as follows:

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, *May* 14*th*, 1884.

Whereas, the Congress of the United States by an Act approved May 3, 1884, did authorize "the Marsh National Bank of Lincoln" located in the city of Lincoln, County of Lancaster and State of Nebraska, to change its name to "The Capital National Bank of Lincoln," whenever the board of directors of The Marsh National Bank of Lincoln, shall accept the new name by resolution, of the said Board, and cause a copy of said resolution, duly authenticated, to be filed with the Comptroller of the Currency.

And whereas, the board of directors of "the Marsh National Bank of Lincoln," at a meeting called for the purpose on May 6, 1884, did vote to accept the change of name to "The Capital National Bank of Lincoln."

And whereas, the President, in accordance with section 1 of said act has executed a certificate under the corporate seal of the bank specifying the action taken by the directors of said bank as above, and their determination as to such change of name, and has caused the same to be recorded in the office of the Comptroller of the Currency.

Now therefore, I, Henry W. Cannon, Comptroller of the
53 Currency do hereby declare that by virtue of said act the name of "The Marsh National Bank of Lincoln," is changed to "The Capital National Bank of Lincoln."

In testimony whereof, I have here subscribed my name and caused my seal of office to be affixed to these presents at the City of Washington, in the District of Columbia this 14th day of May A. D. 1884.

[Seal of the Comptroller of the Currency.]

H. W. CANNON,
Comptroller of the Currency.

Certificate for Certified Copy.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, ss:

Under the provisions of Section 884 of the Revised Statutes of the United States I, Lawrence O. Murray, Deputy and Acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original certificate of the Comptroller of the Currency, under date of May 14, 1884 approving change in name of the Marsh National Bank of Lincoln, Nebraska, to The Capital National Bank of Lincoln, and of the whole of such original on file and of record in my office.

In Testimony Whereof, I have hereunto subscribed my name, and caused my seal of office to be affixed to these presents, at the Treasury Department in the City of Washington and District of Columbia, this twenty fifth day of February A. D. 1899.

[Seal of Comptroller of Currency.]

LAWRENCE O. MURRAY,
Deputy and Acting Comptroller of the Currency.

Ex. 975, P. 2.

* * * * * * *

54 "TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *May 14th*, 1902.

WASHINGTON, *District of Columbia, ss:*

On this fourteenth day of May 1902 personally appeared before the undersigned a Notary Public within and for said District of Columbia, George H. Wood, who being duly sworn states on oath that he is now and has been since the year 1882 File Clerk for the Office of Comptroller of the Currency, Treasury Department, and that all of the "Publishers' Certificates" of publication of National Bank "Reports of Condition" prior to the year 1895 have been destroyed by order of the Comptroller of the Currency because of their large accumulation and inadequate file room of the Department, and their duplication being found in the newspaper files of the country, and further states that said "Publishers' Certificates" of the Capital National Bank of Lincoln, Nebraska, were checked off a list of National Banks as being among those destroyed.

GEORGE W. WOOD.

Subscribed and sworn to this fourteenth day of May, 1902.

EBENEZER SOUTHALL,
Notary Public.

[NOTARY SEAL.]

Ex. 976, P. 1.

55 WASHINGTON, D. C., *May 14th*, 1902.

This is to certify that George H. Wood whose signature appears above is now File Clerk in the Office of the Comptroller of the Currency, and has acted in that capacity since the year 1882.

In Witness Whereof, I have hereto subscribed my name, and caused my seal of office to be affixed to these presents at the City of Washington, in the District of Columbia, this fourteenth day of May A. D. 1902.

[SEAL.]

F. P. KANE,
Deputy & Acting Comptroller of the Currency.

Ex. 976, P. 2.

* * * * * * *

56 Exhibit No. 945 received and read in evidence, being as follows:—

S. 2988.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C. *Sept.* 8, 1891.

M. L. C.
E. A. D.

Mr. C. W. Mosher, President Capital National Bank, Lincoln, Neb.

SIR: The report of an examination of your bank, made on the 19th ultimo, has been received.

The following loans appear to exceed the limit prescribed by Section 5200 U. S. R. S.:

E. W. Mosher	$46,355.98
G. W. Small	56,478.20

It appears from the report that your bank holds real estate mortgages to secure the latter loan, which were acquired May 30, 1886.

Your attention is respectfully called to Section 5137 U. S. R. S. which provides that

"No such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

The examiner reports that when your last report of condition was made to this office, you had overdrafts amounting to $55,004.47 as shown by your books, while you only reported $12,418.97, and classed the remainder as loans and discounts.

You are respectfully informed that your reports and published statements should show the full amount of this item as it appears on the books of your bank.

The practice of allowing overdrafts should be avoided so far as practicable. Demand notes should be taken in all cases for temporary loans.

Overdue paper is reported amounting to $106,760.25 of which $14,000.00 is classed as "bad debts" as defined by Section 5204 U. S. R. S. Such of the overdue paper as is good should be collected or made active by renewal, with satisfactory security for payment after a reasonable extension. The "bad debts" unless satisfactorily arranged in the meantime, should be charged off prior to declaring a dividend.

Your premium account should be charged off, as the 4½% U. S. bonds have no premium value in the market.

The examiner reports that you expect to sustain a loss of $2,000.00. upon the note of Donnell, Lawson and Simpson and $2,500.00. upon your suspended and overdue paper, which together with the $14,000.00 "bad debts" you intend to charge off before declaring a dividend.

Ex. 945 P. 1.

57 It is noted that your current expenses exceed your undivided profits by $4,830.87.

It appears from the report that your bank has a large liability on account of notes and bills rediscounted, which the examiner states has been occasioned by the falling off in your deposits. It is respectfully suggested that some of your loans be called in as soon as practicable.

The examiner reports that your board of directors has held only two meetings during the past year, and there is no record of their having examined or approved of the loans and discounts.

It is respectfully suggested that the conduct of the affairs of a national bank is by law devolved upon the board of directors, and regular and frequent meetings are therefore very desirable.

Respectfully yours,

R. M. NIXON,
Deputy and Acting Comptroller.

Certificate for Certified Copy.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, ss:

Under the provisions of Section 884 of the Revised Statutes of the United States, I, William B. Ridgely Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original letter of R. M. Nixon, Deputy and Acting Comptroller of the Currency September 8, 1891, to C. W. Mosher, President of "The Capital National Bank of Lincoln," Nebraska, and of the whole of such original on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington, and District of Columbia, this twenty ninth day of January A. D. 1902.

[Seal of the Comptroller of Currency.]

WM. B. RIDGELY,
Comptroller of the Currency.

Ex. 945 P. 2.

58 Exhibit No. 946 received and read in evidence, being as follows,—

59 L. 2988.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *Jan.* 30, 1892.

C. S. H.

Mr. R. C. Outcalt, Cashier Capital Nat. Bank, Lincoln, Nebr.

SIR: The report of condition of your bank on Dec. 2, 1891, is received, in which no entries appear in the following schedules or

the back of the report; Bad debts, as defined in Sec. 5204, in Loans and Discounts.

Please inform me by return mail what amounts, if any, should be entered in these schedules.

You are respectfully requested in future to fill out all schedules on the back of the report, writing in the word "none" where there are no items to be entered.

A careful compliance with this request will save correspondence.

Respectfully yours,

R. M. NIXON,
Deputy Comptroller.

Certificate for Certified Copy.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, ss:

Under the provisions of Section 884 of the Revised Statutes of the United States, I William B. Ridgely Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original letter of R. M. Nixon, Deputy Comptroller of the Currency, January 30, 1892, to R. C. Outcalt Cashier of "The Capital National Bank of Lincoln," Nebraska, and of the whole of such original on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name, and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington and District of Columbia, this twenty-ninth day of January A. D. 1902.

[Seal of the Comptroller of Currency.]

WM. B. RIDGELY,
Comptroller of the Currency.

Ex. 946.

60 Exhibit No. 947 received and read in evidence, being as follows;—

61 L. 2988.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY.

H.

Mr. C. W. Mosher, President Capital Nat. Bank, Lincoln, Neb.

SIR: In the report of condition of your bank on Dec. 2, 1891, there is included in the schedule of loans and discounts $14,000. bad debts as defined by Section 5204 of the Revised statutes.

You are respectfully requested to advise me of the present condition of this paper.

Respectfully yours,

R. M. NIXON,
Deputy Comptroller.

Certificate for Certified Copy.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, ss:

Under the provisions of Section 884 of the Revised Statutes of the United States, I William B. Ridgely Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original letter of R. M. Nixon, Deputy Comptroller of the Currency, February 5, 1892 to C. W. Mosher President of "The Capital National Bank of Lincoln" Nebraska, and of the whole of such original on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name, and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington, and District of Columbia this Twenty-ninth day of January A. D. 1902.

[Seal of the Comptroller of Currency.]

WM. B. RIDGELY,
Comptroller of the Currency.

Ex. 947.

62 Exhibit No. 948 received and read in evidence, being as follows;—

63

S. 2988.

M. L. C.
E. A. D.
G. M. C.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *Feb.* 16, 1892.

Mr. C. W. Mosher, President Capital Nat'l Bank, Lincoln, Neb.

SIR: The report of an examination of your bank, made on the 26th ultimo, has been received.

The following loans appear to exceed the limit prescribed by Section 5200 U. S. R. S.

E. W. Mosher	$50,950.28
G. W. Small	51,752.53

The examiner reports that you have some loans that have been carried along for a number of years, which he thinks should be collected as soon as practicable, and includes the above excessive loans in this class. He also thinks that Mr. Mosher's liability as an endorser is too large.

The agreement of Messrs. R. C. Outcalt and C. W. Mosher to reduce their liabilities, and in future adjust all accounts so that over drafts will be confined to those of a temporary nature, and also that they will close the bulk of their outside interests, and give their attention to the affairs of the bank, is received.

The examiner states that owing to these outside dealings the business of the bank has suffered.

Overdrafts are reported amounting to $60,936.78. Please inform me to what extent these have been reduced since the examination. The practice of allowing overdrafts should be avoided so far as practicable.

Overdue paper is reported amounting to $104,868.19 of which $14,500 is classed as "bad debts" as defined by Section 5204 U. S. R. S. Such of this overdue paper as is good should be collected or made active by renewal, with satisfactory security for payment after a reasonable extension.

The examiner reports that losses aggregating $30,000. including the amount of "bad debts" reported above, were charged off during the examination.

The examiner reports that your by-laws require the board of directors to meet only twice a year, and that they often only go through the form of declaring a dividend, and do not examine the loans and discounts. He states that you have no discount nor examining committee.

It is respectfully suggested that the conduct of the affairs of a national bank is by law devolved upon the board of directors, and regular and frequent meetings are therefore very desirable.

It appears from the report that your bank was borrowing $137,234.16 on notes and bills rediscounted, and that it has been borrowing money continuously during the past year.

The examiner states that the amount of your borrowings have been largely reduced since his previous examination, and it is suggested that all this liability be paid off, and that the implied power to borrow money should be reserved for emergencies, and not habitually used for the purpose of procuring banking capital.

Ex. 948 P. 1.

64–67 The necessity for borrowing appears to have arisen from the excessive loans made, and your first effort should therefore be to realize on these by reducing them to the lawful limit. Special effort should also be made to collect or renew your overdue paper.

Please bring this communication to the attention of your board of directors for consideration, and for reply over their individual signatures.

C. Ex. 944.

E. S. LACEY,
Comptroller.

Certificates for Certified Copy.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, ss:

Under the provisions of Section 884 of the Revised Statutes of the United States, I William B. Ridgely Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original letter of E. S. Lacey, Comptroller of the Currency, February 16, 1892 to C. W. Mosher President of

"The Capital National Bank of Lincoln," Nebraska, and the whole of such original on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name, and caused my seal of office to be affixed to these presents at the Treasury Department, in the city of Washington and District of Columbia, this twenty-ninth day of January A. D. 1902.

[Seal of the Comptroller of Currency.]

WM. B. RIDGELY,
Comptroller of the Currency.

Ex. 948 P. 2.

68 Notice published in the State Journal under date of Jan. 9th, 1887, received and read in evidence, being as follows:

Ex. 977. O. P. H. 5/29/1902.

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business, December 28, 1886.

Resources.

Loans and discounts	$737426.12
Overdrafts	3974.33
U. S. Bonds to secure circulation	50000.00
Other stock- bond- and mortgages	22739.34
Due from approved and reserve Agents	74068.63
Due from other National Banks	56215.29
Due from State Banks and Bankers	10495.36
Real Estate Furniture and fixtures	7177.33
Current expenses and taxes paid	8885.65
Premiums paid	7188.43
Checks and other cash items	13742.02
Bills of other Banks	3712.00
Fractional paper currency, nickels and cents	216.42
Specie	27308.00
Legal Tender Notes	10400.00
Redemption with U. S. Treasurer, (5% circulation)	1900.00
Total	$1035448.92

69–72 Liabilities.

Capital Stock paid in		$300000.00
Surplus funds		12000.00
Undivided profits		28439.38
National Bank notes outstanding		45000.00
Individual deposits subject to checks	$414962.35	
Demand certificates of deposit	40859.66	
	455822.01	

Due to other National Banks.....	107648.27	
Due to State Banks and Bankers...	34448.66	
		597918.94
Notes and bills rediscounted.....		52090.60
Total		$1035448.92

STATE OF NEBRASKA, *Lancaster County, ss:*

I, C. W. Mosher, president of the above Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

C. W. MOSHER, *President.*

Subscribed in my presence and sworn to before me this 11th day of October 1886.

E. R. SMITH, *N. P.*

Correct.
Attest:

C. W. MOSHER,
C. E. YATES,
D. E. THOMPSON,
Directors.

J. W. D.

* * * * * * *

73 & 74 Ex. 978. O. P. H. 5/29/1902.

(Daily Nebraska State Journal, Lincoln, Saturday, August 6th, 1887.)

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business, August 1st, 1887.

Resources.

Loans and discounts.....	$908623.31
Overdrafts	6231.69
U. S. Bonds to secure circulation.....	50000.00
Other Stocks, Bonds, Mortgages.....	15281.00
Due from approved reserve agents.....	75189.86
Due from other National Banks.....	42048.82
Due from State Banks and Bankers.....	5624.17
Real Estate Furniture and fixtures.....	5650.00
Current expenses paid and taxes paid.....	2192.88
Premiums paid	6200.00
Checks and other cash items.....	45349.70
Bills of other Banks.....	1570.00
Fractional Currency, nickels and cents.....	91.28
Specie	34975.50
Legal tender notes.....	16108.00
Redemption fund with U. S. Treasurer (5% of circulation)	2250.00
Total	$1217386.21

Liabilities.

Capital Stock paid in		$300000.00
Surplus fund		16000.00
Undivided profits		3447.66
National Bank notes outstanding		45000.00
Individual deposits subject to checks	$454253.97	
Demand certificates of deposit	119864.68	
Due to other National Banks	201760.43	
Due to State Bank- and Bankers	77059.47	
		$852938.55
Total		$1217386.21

STATE OF NEBRASKA, *Lancaster County, ss:*

I, R. C. Outcalt, Cashier of the above named bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed in my presence and sworn to before me this 5th day of August, 1887.

[SEAL.] J. W. MAXWELL, *N. P.*

MANUELL.

Correct.
Attest:

W. W. HOLMES,
D. E. THOMPSON,
C. W. MOSHER,
Directors.

J. W. D.

* * * * * * *

75 Ex. 979. O. P. H. 5/29/1902.

(Daily Nebraska State Journal, Lincoln, Tuesday, October 11th, 1887.)

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business, October 5, 1887.

Resources.

Loans and discounts	$832190.33
Overdrafts	2590.53
U. S. Bonds to secure circulation	50000.00
Other Stocks bonds and mortgages	16129.56
Due from approved Reserve Agents	74162.21
Due from other National Banks	36377.13
Due from State Banks and Bankers	14543.96
Real estate furniture and fixtures	7100.00
Current expenses and taxes paid	5753.47

Premiums paid		5500.00
Checks and other Cash items		57217.35
Bills of other Banks		635.00
Fractional paper currency, nickels and cents		87.70
Specie		37855.50
Legal tender notes		8823.00
Redemption funds with U. S. Treasurer, (5 % of circulation)		2250.00
Total		$1151214.74

Liabilities.

Capital stock paid in		$300000.00
Surplus fund		16000.00
Undivided profits		9862.78
National bank notes outstanding		45000.00
Individual deposits subject to check	$430220.61	
Demand certificates of deposit	119453.43	
Cashier's checks outstanding	4159.04	
Due to other National Banks	145106.92	
Due to State Banks and Bankers	57411.96	
		756351.96
Notes and bills rediscounted		24000.00
Total		$1151214.74

STATE OF NEBRASKA, *Lancaster County, ss:*

I, R. C. Outcalt, Cashier of the above named bank, do solemnly swear that the above named statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed in my presence and sworn to before me this 10th day of October, 1887.

E. R. SMITH,
Notary Public.

Correct.
Attest:

C. W. MOSHER,
W. W. HOLMES,
A. P. S. STUART,
Directors.

J. W. D.

* * * * * * *

76 Mr. NORVAL: I now offer in evidence No. 980 being the report inquired of.

Exhibit No. 980 received and read in evidence as follows:

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business December 9th, 1892.

Resources.

Loans and discounts		$768601.44
Overdrafts secured and unsecured		6217.74
United States Bonds to secure circulation		50000.00
Stocks securities and etc		325.00
Due from approved Reserve Agents		107090.01
Due from other National Banks		17800.33
Due from State Banks and Bankers		5394.72
Banking house furniture and fixtures		5770.00
Other real estate and mortgages owned		38617.92
Current expenses and taxes paid		14286.28
Checks and other Cash items		3698.56
Exchanges for clearing house		8841.16
Bills of other Banks		2355.00
Fractional paper currency, nickels and cents		298.71
Specie		26789.50
Legal tender notes		17431.00
Redemption fund with U. S. Treasurer (5% of circulation)		1350.00
Total		$1074867.37

Liabilities.

Capital Stock paid in		$300000.00
Surplus fund		6000.00
Undivided profits		21180.75
National Bank notes outstanding		45000.00
Individual deposits subject to check	$356139.33	
Demand certificates of deposit	158545.88	
Due to other National Banks	81574.14	
Due to State Banks and Bankers	47372.89	
		643632.24
Notes and bills rediscounted		59054.38
		$1074867.37

STATE OF NEBRASKA, *County of Lancaster, ss:*

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15th day of December 1892.

HAL. C. YOUNG,
Notary Public.

Correct.
Attest:

C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,
Directors.

J. W. D.

* * * * * * *

79 & 80 "Capital National Bank, Lincoln, Nebraska.

Capital, $300,000.00.

C. W. Mosher, President. H. J. Walsh, Vice P't.

R. C. Outcalt, Cashier.

Directors:
W. W. Holmes,
D. E. Thompson,
C. W. Mosher,
R. C. Phillips,
E. P. Hamer,
C. E. Yates.
A. P. S. Stuart.

Acc'ts solicited, Banks, Bankers and Merchants."

* * * * * * *

81–83 Ex. 982. O. P. H. 5, 28, 1902.

(Lincoln Daily Call, Lincoln, December 18th, 1888.)

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, Dec. 12th, 1888.

Resources.

Loans and discounts	$860944.18
Overdrafts secured and unsecured	11529.18
U. S. Bonds to secure circulation	50000.00
Other stocks, bonds and mortgages	9148.88
Due from approved reserve agents	83964.65
Due from other National Banks	38539.83
Due from State Banks and Bankers	10259.39
Real estate furniture and fixtures	28258.03
Premiums paid	4000.00
Current expenses and taxes paid	21112.31
Checks and other cash items	19495.08
Bills of other Banks	2830.00
Fractional paper currency, nickels and cents	244.39
Specie	20785.50

Legal tender notes	22400.00
Redemption fund with U. S. Treasurer, (5% of circulation)	1730.00
Total	$1185238.42

Liabilities.

Capital stock paid in		$300000.00
Surplus fund		20000.00
Undivided profits		37614.80
National Bank notes outstanding (515198.19)*		45000.00
Individual deposits subject to check	$397275.24	
Demand certificates of deposit	117922.95	
Cashier's checks	4892.06	
Due to other National Banks	63392.84	
Due to State Banks and Bankers	87960.05	
		671443.19
Notes and Bills Rediscounted		111180.43
		$1185238.42

STATE OF NEBRASKA, *County of Lancaster, ss:*

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15th day of December, 1888.

J. W. MAXWELL,
Notary Public.

Correct.
Attest:

C. W. MOSHER,
C. E. YATES,
W. W. HOLMES,
Directors.

J. W. D.

* * * * * * *

[* In pencil in copy.]

84 & 85 Ex. 983. 5, 29, 1902. O. H. P.

(The Lincoln Daily Call.)

Eleventh Year, Lincoln, Nebraska, Saturday Evening, October 4, 1889.

No. 95, Page 4.

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, September 30th, 1889.

Resources.

Loans and discounts		$800159.88
Overdrafts secured and unsecured		6372.45
U. S. Bonds to secure circulation		50000.00
Other Stocks, bonds and mortgages		21954.94
Due from approved reserve agents		76238.34
Due from other National Banks		42329.97
Due from State Banks and Bankers		5390.35
Real estate furniture and fixtures		43741.70
Current expenses and taxes paid		7935.58
Premiums paid		3750.00
Checks and other cash items		3964.67
Exchanges for clearing house		12844.22
Bills of other Banks		2240.00
Fractional paper currency, nickels and cents		643.06
Specie		33029.75
Legal tender notes		12333.00
Redemption fund with U. S. Treasurer (5% of circulation)		1500.00
Total		$1124432.09

Liabilities.

Capital stock paid in		$300000.00
Surplus fund		24000.00
Undivided profits		14211.73
National Bank notes outstanding (489613.96)*		45000.00
Individual deposits subject to check	$324391.90	
Demand certificates of deposit	165222.06	
Cashier's checks outstanding	12597.50	
Due to other National Banks	84604.80	
Due to State Banks and Bankers	92722.00	
		$679538.26
Notes and bills rediscounted		61682.92
Total		$1124432.91

[* In pencil in copy.]

STATE OF NEBRASKA, *Lancaster County, ss:*

I, R. C. Outcalt of the above named Bank. do solemnly swear that the above named statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed in my presence and sworn to before me this 4th day of October 1889.

J. W. MAXWELL,
Notary Public.

Correct.
Attest:

C. W. MOSHER,
C. E YATES,
W. W. HOLMES,
Directors.

J. W. D.

* * * * * * *

86 & 87 Ex. 984. 5, 29, 1902. O. P. H.

(Lincoln Daily Call, Lincoln, December 16th, 1889.)

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business December 11th, 1889.

Resources.

Loans and discounts	$808781.26
Overdrafts secured and unsecured	10977.12
U. S. Bonds to secure circulation	50000.00
Stocks securities *and* etc	41954.94
Due from approved reserve agents	52103.47
Due from other National Banks	22423.53
Due from State Banks and Bankers	18564.82
Banking house furniture and fixtures	5770.00
Other real estate and mortgages owned	41505.47
Current expenses and taxes paid	10948.24
Premium on U. S. Bonds	3750.00
Checks and other cash items	8330.76
Exchanges for clearing house	5102.38
Bills of other Banks	2670.00
Fractional paper currency, nickels and cents	153.02
Specie	27623.70
Legal tender notes	13499.00
Redemption fund with U. S. Treasurer, (5% of circulation)	1709.41
Total	$1125921.12

Liabilities.

Capital Stock paid in		$300000.00
Surplus fund		24000.00
Undivided profits		24126.30
National Bank notes outstanding		45000.00
Individual deposits subject to check	$301390.77	
Demand certificates of deposit	157159.04	
Cashier's checks outstanding	2695.20	
Due to other National Banks	51283.67	
Due to State Banks and Bankers	70087.40	
		582616.08
Notes and Bills Rediscounted		150184.74
Total		$1125927.12

STATE OF NEBRASKA, *County of Lancaster, ss:*

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly — that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 11 day of December 1889.
J. W. MAXWELL, *N. P.*

Correct.
Attest:

C. W. MOSHER,
A. P. STUART,
W. W. HOLMES,
Directors.

J. W. D.

* * * * * * *

88-90 Ex. 985. 5, 29, 1902. O. P. H.

(The Lincoln Daily Call, Friday Evening, December 26, 1890, Page 5.)

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, December 19th 1890.

Resources.

Loans and discounts	$847442.40
Overdrafts secured and unsecured	9330.20
U. S. Bonds to secure circulation	50000.00
Stocks, securities, claims & etc.	16909.88
Due from approved reserve agents	116166.95
Due from other National Banks	26033.84
Due from State Banks and Bankers	2996.22

Banking house furniture and fixtures	5770.00
Other real estate and mortgages owned	55099.59
Current expenses and taxes paid	16304.98
Premiums on U. S. Bonds	2400.00
Checks and other cash items	2222.50
Exchanges for clearing house	15235.52
Bills of other Banks	3535.00
Fractional paper currency, nickels & cents	188.30
Specie	59640.50
Legal tender notes	2505.00
Redemption fund with U. S. Treasurer (5% of circulation	2250.00
Total	$1234030.88

Liabilities.

Capital stock paid in		$300000.00
Surplus fund		28000.00
Undivided profits		33585.80
National Bank notes outstanding		45000.00
Individual deposits subject to check	$364123.01	
Demand certificates of deposit	270168.96	
Cashiers' checks outstanding	7298.89	
Due to other National Banks	42280.26	
Due to State Banks and Bankers	46924.39	
		730795.51
Notes and Bills Rediscounted		96649.57
		$1234030.88

STATE OF NEBRASKA, *Lancaster County, ss:*

I, R. C. Outcalt Cashier of the above named Bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed in my presence and sworn to before me this 26th day of December, 1890.

J. W. MAXWELL,
Notary Public.

Correct.
Attest:

C. W. MOSHER,
D. E. THOMPSON,
W. W. HOLMES,
Directors.

J. W. D.

91 & 92 Ex. 986. 5/29/1902. O. P. H.

(The Lincoln Daily Call, Saturday Evening, July 18, 1891, Page 4.)

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, July 9th, 1891.

Resources.

Loans and discounts		$898011.57
Overdrafts secured and unsecured		12834.98
U. S. Bonds to secure circulation		50000.00
Stocks, securities, claims and etc		2913.49
Due from approved Reserve agents		51984.76
Due from other National Banks		23946.91
Due from State Banks and Bankers		2880.04
Banking house furniture and fixtures		5770.00
Current expenses and taxes paid		3815.30
Premiums on U. S. Bonds		1437.50
Checks and other Cash items		5662.26
Exchanges for clearing house		4544.50
Bills of other Banks		11145.00
Fractional paper currency, nickels and cents		251.70
Specie		31350.00
Legal tender notes		14445.00
Redemption fund with U. S. Treasurer, (5% of circulation)		600.00
Total		$1121593.01

Liabilities.

Capital Stock paid in		$300000.00
Surplus fund		30000.00
Undivided profits		17304.87
National Bank notes outstanding		45000.00
Individual deposits subject to check	$367258.70	
Demand certificates of deposit	139199.07	
Cashier's checks outstanding	3229.16	
Due to other National Banks	54426.22	
Due to State Banks and Bankers	47883.89	
		611897.04
Notes and Bills Rediscounted		117391.10
		$1121593.01

STATE OF NEBRASKA, *Lancaster County, ss:*

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed in my presence and sworn to before me this 18th day of July 1891.

HAL. C. YOUNG,
Notary Public.

Correct.
Attest:

C. W. MOSHER,
D. E. THOMPSON,
C. E. YATES,
Directors.

J. W. D.

* * * * * * *

93-95 Ex. 987. O. P. H. 5/29/1902.

(The Lincoln Daily Call, Thursday Evening, October 1, 1891, Page 5.)

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, September 25th, 1891.

Resources.

Loans and discounts		$834139.46
Overdrafts, secured and unsecured		4250.65
U. S. Bonds to secure circulation		50000.00
Stocks, securities, claims and etc		53063.49
Due from approved reserve agents		52788.80
Due from other National Banks		15670.94
Due from State Banks and Bankers		9521.76
Banking house furniture and fixtures		5770.00
Current expenses and taxes paid		7547.15
Checks and other Cash items		7060.81
Exchanges for clearing house		5873.65
Bills of other Banks		630.00
Fractional paper currency, nickels and cents		249.50
Specie		26653.50
Legal tender notes		18984.00
Redemption fund with U. S. Treasurer (5% of circulation)		2250.00
Total		$1094453.71

Liabilities.

Capital stock paid in		$300000.00
Surplus fund		32000.00
Undivided profits		14785.57
National Bank notes outstanding		45000.00
Individual deposits subject to checks	$276860.66	
Demand certificates of deposit	227416.81	

Cashier's checks outstanding.....	3914.82	
Due to other National Banks.....	40262.69	
Due to State Banks and Bankers.....	55641.64	
		604096.62
Notes and Bills rediscounted.....		98571.52
		$1094453.71

STATE OF NEBRASKA, *Lancaster County, ss:*

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed in my presence and sworn to before me this 1st day of October, 1891.

HAL. C. YOUNG,
Notary Public.

Correct.
Attest:

C. W. MOSHER,
A. P. S. STUART,
E. P. HAMER,
Directors.

J. W. D.

96-101 Ex. 988. 5/29/1902. O. P. H.

(The Lincoln Daily Call, Lincoln, December 14th, 1891.)

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, December 2nd, 1891.

Resources.

Loans and discounts.....	$870255.72
Overdrafts secured and unsecured.....	3164.20
U. S. Bonds to secure circulation.....	50000.00
Stocks securities and etc.....	53513.49
Due from approved reserve agents.....	52681.04
Due from other National Banks.....	11701.37
Due from State Banks and Bankers.....	7415.11
Banking house furniture and fixtures.....	5770.00
Other real estate and mortgages owned.....	
Current expenses and taxes paid.....	12881.93
Checks and other cash items.....	8595.13
Exchanges for clearing house.....	8310.79
Bills of other Banks.....	1215.00
Fractional paper currency, nickels and cents.....	241.60
Specie	46011.50

Legal tender notes	9940.00
Redemption fund with U. S. Treasurer (5% of circulation)	2250.00
Total	$1143946.88

Liabilities.

Capital stock paid in		$300000.00
Surplus fund		32000.00
Undivided profits		23276.89
National Bank notes outstanding		45000.00
Individual deposits subject to check	$271018.85	
Demand certificates of deposit	207710.11	
Due to other National Banks	62312.57	
Due to State Banks and Bankers	77432.32	
		618473.85
Notes and Bills Rediscounted		125196.14
		$1143946.88

STATE OF NEBRASKA, *County of Lancaster, ss:*

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 14th day of December, 1891.

HAL. C. YOUNG,
Notary Public.

Correct.
Attest:

C. W. MOSHER,
C. E. YATES,
A. P. S. STUART,
Directors.

J. W. D.

102 Mr. H. T. JONES, called as a witness on behalf of the Plaintiffs, and being first duly sworn, testified as follows:

Direct examination.

By Mr. J. J. THOMAS:

Q. You may state your name.
A. H. T. Jones.
Q. You reside here in Seward?
A. Yes sir.
Q. For how many years?
A. Since July 1873.

Q. What is your occupation?
A. The banking business.
Q. How long have you been engaged in the banking business?
A. Since 1884.
Q. I hand you exhibit No. 960 and ask you to examine it, and state if you are acquainted with the signatures appearing on that exhibit.
A. I am yes sir.
Q. I will ask you to state if you know, if the signatures of C. W. Mosher, R. C. Outcault, E. P. Hamer, R. O. Phillips, A. P. S. Stuart, D. E. Thompson, and C. E. Yates is their genuine signatures?
A. They are.
Q. Handing you exhibit No. 961, I will ask you to state if you know if the signatures of C. W. Mosher, A. P. S. Stewart, W. W. Holmes, D. E. Thompson, R. O. Phillips, C. E. Yates, and E. P. Hamer are their genuine signatures.

Mr. DEWEESE: I wish to interrogate the witness.
COURT: You may proceed.

By Mr. WHEDON:

Q. What makes you think you are acquainted with E. P. Hamer's signature? Where did you ever see it?
A. I have seen it in the records and files of the Capital National Bank.
103 Q. You have seen the name "E. P. Hamer" written there in some books, that is you found it already written there.
A. No among some of the files and papers I saw his original signature.
Q. How do you know that that was his signature?
A. The same as I learn to know the signature of any other man.
Q. Suppose you saw my name written in a book there would you necessarily conclude that I had written it there?
A. No sir.
Q. How do you know that he wrote his name there?
A. I am familiar with it, doing business with that bank from 1884 up to January 1893, I saw the signatures of the officers of that bank frequently.
Q. But how do you know that they were the signatures of the officers of that bank, did you ever see any of them write their name?
A. Yes, a great many of them.
Q. Did you ever see Hamer write his name?
A. No sir.
Q. And you never got a letter personally from him?
A. No sir.
Q. You wouldn't know any more than any other person when you saw E. P. Hamer, the name written, whether he wrote it, you have no foundation for saying it is his signature have you?
A. Not in the case you have stated.
Q. You never saw Dr. Hamer, did you?

A. Yes sir, many times.
Q. You never saw him writing his name?
A. No sir.
Q. That same thing applies to D. E. Thompson, you never saw him write his name?
A. I couldn't say that I ever saw him sign his name, no sir.
Q. Nor C. E. Yates.
104 A. No sir.
Q. You simply find these names written and therefore you conclude that they must have written them?
A. No, I found the names attached, in many instances to papers to the department at Washington, and also found their names frequently among the records of the Capital National Bank.
Q. You never saw Mr. Walsh's name signed anywhere.
A. Oh yes.
Q. To what paper?
A. I have done business with Mr. Walsh. I have transacted some business for Mr. Walsh concerning property here in Seward.
Q. What I more particularly inquire about is Yates, and Thompson and Hamer. You didn't have any acquaintance with Mr. Thompson did you prior to the failure of the bank?
A. What do you mean by acquaintance.
Q. Did you ever meet him, and talk to him, or have any correspondence with him?
A. Never had any correspondence with him directly, only as an officer of the bank.
Q. You never had any correspondence with him as an officer of the bank did you?
A. I have done business where it was necessary for his signature to appear.
Q. What was it?
A. I couldn't state right now what it was.
Q. When you deposited money there, you didn't have anything to do with him, nor Yates, nor Hamer?
A. No that would be done with the proper clerks of the bank.

Mr. DEWEESE: We don't think he is qualified to testify, and the defendants Thompson, Yates and the estates of Walsh and Hamer each separately object as the witness is not qualified, and it is incompetent.

105 By Mr. THOMAS:

Q. Have you made an investigation of the books, files and documents of the Capital National Bank within the past few years?
A. Yes sir——
Q. How extensive has that examination been?
A. The longest at any one time was about three weeks. All together I have worked on these books in the neighborhood of six months.
Q. Have you examined the original papers, certificates of deposit, checks etc., that come out of the files and documents of the bank

upon which appear the signatures of these parties whose signatures also appear on the Exhibits you hold in your hand?

A. Yes sir.

Q. How frequently have you seen those checks and certificates of deposit to which these parties have signed their names?

A. Well I have seen the signatures there a great many times in one form, and sometimes in different form.

Q. Did you see their signatures among the books of the bank where they receipted for stock in the Capital National Bank on the stub book, "Certificate of Stock" stub book?

A. Yes sir.

Q. Do you know whether in looking through the files you found their signatures where they have endorsed checks issued to them in payment of dividends of the Capital National Bank?

A. I think not, the dividends were simply credited to their accounts.

Q. Have you found checks signed by them, which were by them issued or signed, and the funds drawn out of the bank?

A. I saw a great many checks there shortly after the failure of the bank.

Q. Checks which had been issued, and paid by the bank during its existence and prior to its failure?

A. Yes sir.

106 Q. And signed by the parties whose names appear on the Exhibits you have in your hand?

A. Some of them.

Q. Can you say Mr. Jones that you are acquainted with these signatures, and know whether or not they are the genuine signatures of the parties who purport to have signed them?

A. To the best of my knowledge I would say that I am.

Q. I will ask you to state whether Exhibit 961 bears the genuine signature- of C. W. Mosher, A. P. S. Stuart, W. W. Holmes, D. E. Thompson, R. O. Phillips, C. E. Yates and E. P. Hamer?

A. It does.

Q. I hand you exhibit 942 and ask you in whose handwriting that letter and the signature thereto is, if you know.

A. That letter and the signature is in the handwriting of E. P. Hamer.

Q. I hand you exhibit No. 943, and ask you to state if you know who wrote the body of the letter?

A. The body of the letter is written by C. W. Mosher.

Q. You may state if the signatures to that letter are the genuine signatures of C. W. Mosher, R. C. Outcalt, D. E. Thompson, E. P. Hamer, A. P. S. Stuart, R. O. Phillips and C. E. Yates.

107 A. They are their genuine signatures.

Q. I hand you Exhibit No. 944, and will ask you to state if that letter contains and has signed to it the original signatures of C. W. Mosher, C. E. Yates, Director R. O. Phillips, Director, D. E. Thompson, Director, A. P. S. Stuart Director, E. P. Hamer Director and R. C. Outcalt Director.

A. They are the genuine signatures of the parties named.

Q. I hand you now Exhibit No. 972, and will ask you to state if you know if that bears the original and genuine signatures of C. W. Mosher, C. E. Yates and R. O. Phillips.

108 A. They are.

Mr. THOMAS: That is all.
Mr. ROSE: That is all.
Mr. WHEDON: That is all.
Witness excused.

By leave of Court and consent of all parties the witness Mr. Lynch has leave to withdraw the following exhibits, and to substitute copies of same certified to by the Clerk of the District Court, —Exhibits 942, 943, 944, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971 and 972.

Court adjourns until June 2nd, at 9 o'clock A. M., at which time the taking of testimony in these cases will be resumed.
Jury cautioned and excused until said time.

JUNE 2ND, 1902—9 o'clock a. m.

G. W. POST, called as a witness on behalf of the Plaintiffs and being first duly sworn testified as follows:—

Direct examination.

By Mr. R. S. NORVAL:

Q. Where do you reside, Judge?
A. York, Nebraska.
Q. How long have you resided in York?
A. Oh, something over twenty-five years.
Q. What is your business?
A. I am a banker.
Q. You may state if you ever knew one E. W. Mosher, or Edwin M. Mosher?

109 A. Yes sir, I knew him.

Q. You may state where Mr. Mosher resided, in the early '90's and latter part of 89 and 88.
A. He resided in York.
Q. You may state if you were acquainted with his financial and property condition and standing in, commencing with 1890, and up to January 1893.
A. Yes I was pretty well acquainted with it at that time.
Q. You may state if you know whether or not he was owing obligations at that time, during those years, well from 1899 up to 1893.
A. Yes I know he was owing some obligations but I couldn't tell how many.
Q. You may state if you know whether or not Mr. E. W. Mosher was solvent and able to pay his debts from 1890 up to January 1893.

110 A. I think I know yes sir.

Q. Well state what his condition was with reference to

being able to pay his debts during that time, as to being solvent or insolvent.

A. I think he was insolvent.

Q. Did you know the firm of Stark & Mosher?

A. Yes sir.

Q. Did you know Mr. Stark a member of the firm of Stark & Mosher?

A. Yes sir.

Q. You may state if you knew his financial condition during the same period that I have interrogated you about as to Mr. Mosher.

111 A. I have not as intimate a knowledge of his affairs as I had of Mosher's. I knew in a general way about him, but I have not as intimate personal acquaintance with his business that I had with Mosher's.

Q. Do you know whether he paid his obligations or not?

Q. Do you know of the firm of Stark & Mosher, and their responsibility?

A. Yes, sir, in a general way.

Q. You may state what that was.

112 & 113 A. I think they are irresponsible.

Q. And were you acquainted with one William A. Sharar, who formerly lived at York?

A. Associated with Mr. Mosher there?

Q. Yes, sir.

A. Yes I knew him.

Q. And did you know him during the period I have been interrogating about?

A. Yes sir.

Q. Do you know his standing and property condition during that period?

A. Yes sir

Q. You may state what it was as to solvency or insolvency.

A. He was insolvent.

* * * * * * *

Q. You may state if you know whether or not there were judgments rendered against Mr. Mosher, which are unsatisfied, in York County?

* * * * * * *

114 Mr. EDWARD HURLBERT Jr., called as a witness on behalf of the Plaintiffs and being first duly sworn testified as follows:—

Direct examination.

By Mr. J. J. THOMAS:

Q. You may state your name.

A. Edward Hurlbert Jr.

Q. Where do you reside?

A. Hastings.

Q. How long have you resided there?

A. About two years.

Q. Are you acquainted with one Charles W. Mosher formerly President of the Capital National Bank at Lincoln?

A. Yes sir.

Q. Have you ever been associated with him in any business?

A. Yes sir.

Q. Were you associated with him in connection with a company commonly known as the Western Manufacturing Company?

A. I worked for Mr. Mosher, yes sir.

115 Q. When did that company commence to exist?

A. In 1884 or 1885 I believe.

Q. When did it cease to do business?

A. We ceased to be in active business in 1888 or 1889.

Q. You may state who comprised that company, or firm.

A. C. W. Mosher.

Q. Was there anyone else?

A. No sir.

Q. What was the nature of your interest in the company?

A. I worked on a salary and a per cent. of the profits.

Q. Did the company during its existence execute any notes payable to the Capital National Bank?

A. Yes sir.

Q. Who signed those notes for the Western Manufacturing Company?

A. I did.

Q. You may state what amount of notes the Western Manufacturing Company was owing the Capital National Bank at the time it ceased doing business in 1888 or 1889, when you say it did cease to do business.

116 A. My judgment would be,—I have no way of knowing definitely but my judgment would be that there was from $25,000.00 to $35,000.00 worth of old notes.

Q. Did they make any notes, or did you on behalf of the company execute any notes to the Capital National Bank after the Western Manufacturing Company ceased to do an active business?

A. Yes sir.

Q. Now you may state how long they continued, or how long you continued on behalf of the Western Manufacturing Company to execute notes to the Capital National Bank?

117 A. Until the failure of the bank.

Q. Until the failure of the Capital National Bank?

A. Yes sir.

Q. You may state if you know how many notes, or the amount of notes of the Western Manufacturing Company of which you were Manager, were held by the Capital National Bank, or had been rediscounted by the Capital National Bank, or both, at the time of its failure in January 1893.

* * * * * * *

Q. For what amounts or denominations were those notes that you signed as Manager of the Western Manufacturing Company, which were executed to the Capital National Bank.

118-131 A. They were mostly $5,000.00 each.
Q. Do you know what became of the notes after you executed them?
A. I do not.

* * * * * * *

132 Redirect examination.

By Mr. THOMAS:

Q. Did you state in answer to a question by Mr. Deweese, that in July 1889 all of the notes of the Western Manufacturing Co., had been taken up except one for $5,000.00.
A. I didn't say that I knew that positively, No.
Q. What did you state?
A. I stated that that was what I had been,—I don't remember what my answer was to that.
Q. Well what are the facts?
A. I don't know to a certainty that that is the fact, that they were all taken up except a $5,000.00 one.
Q. Did you get any information from Mr. Mosher as to that being a fact?
A. I believe he said "two or three" is the way he put it. Mr. Mosher told me that they had all been taken up.
Q. Except how many?
A. He said "two or three" I believe is the way he put it.
Q. Of what amount?
A. $5,000.00 each.
Q. But you don't know of your own personal knowledge whether any of them were in the bank or not?
A. I do not.
Q. At that time he informed you that they had all been taken up except two or three?
A. Yes sir.
Q. Then what notes you gave after that to the bank, you may state in a general way how that was done.
A. Well Mr. Mosher would call me into the bank and he would say "There is a note due on the 4th," this might be the first of the month, and he would say "there will be one of those notes due
133 on the 4th, and there will be another one due on the 5th" or 6th, or whatever it might be, and he would like to have me make him two or three notes, and when these notes are due he would take them up with these renewals.
1 Q. Then what would you do?
A. I would make the notes.
2 Q. And did you get the old ones that you spoke of being taken up by these notes?
A. Not always no.
3 Q. Did you in very many instances?
A. No not very many.
4 Q. In most cases did you ever get to see the old note that was supposed to be taken up by the renewal?

A. Not in a great many cases.

* * * * * * *

8 Q. When this company was organized what capital if any did Mosher put into the Company?

A. Why we borrowed from the Capital National Bank $25,000 00.

9 Q. Was that all that was put into the company?

A. That was all that was put in at that time.

10 Q. In other words did the company begin its exist-

134–144 ence on borrowed capital?

A. Yes sir.

Q. Wholly?

A. Yes sir.

Q. Now was the company financially successful or did you lose money?

A. We didn't make any money.

Q. Did you lose any money?

A. Yes sir.

Mr. Thomas: That is all.

* * * * * * *

145 By Mr. Thomas:

Q. Do you know what was done with the notes you signed for the company after you executed them and delivered them to Mr. Mosher?

A. No sir.

Q. Do you know whether they were issued as renewals of other notes or put into the bank as original paper?

A. I don't know only what I was told, that is all.

Q. You don't know whether they were used as rediscounts or otherwise do you?

A. I do not.

Q. You made notes whenever requested to do so by Mr. Mosher?

A. Yes sir.

Mr. Thomas: That is all.

Witness excused.

* * * * * * *

146 A. L. Clark, called as a witness on behalf of the plaintiffs and being first duly sworn testified as follows:—

Direct examination.

By Mr. J. J. Thomas:

Q. You may state your name.

A. A. L. Clark.

Q. Where do you reside?

A. In Hastings.

Q. What is your occupation?

A. I am a banker.

Q. With what institution are you associated?
A. The First National Bank.
Q. You are President of that bank?
A. Yes sir.
Q. How long have you been its President?
A. Since its organization in 1881.
Q. You have been President continuously from that date up to this?
A. Yes sir.
Q. I will ask you to state if the First National Bank of Hastings, of which you are President executed to the Capital National Bank of Lincoln, Nebraska, on or about the 20th day of July 1886 a note for the sum of $10,000.00?
147 A. It did not.
Q. Or about that time?
A. No sir.
Q. Did the bank of which you are President, the First National Bank of Hastings, execute to anyone for the Capital National Bank, such a note?
A. No sir.

Mr. THOMAS: That is all.

Cross-examination.

By Mr. DEWEESE:

No cross.

By Mr. THOMAS:

Q. Did the First National Bank of Hastings ever execute to the Capital National Bank, or to anyone for that bank, a note for the sum of $20,000.00 during the month of June or July 1886?
148 A. It did not.
Q. Did the First National Bank of Hastings, owe or pay to the Capital National Bank any such note?
A. No sir.

Witness excused.

F. S. JOHNSON, called as a witness for the plaintiffs and being first duly sworn testified as follows,—

Direct examination.

By Mr. R. S. NORVAL:

Q. Where do you reside?
A. Milford, Nebraska.
Q. How long have you resided there?
A. About 22 years.
Q. What is your business?
A. Milling and Banking business.

Q. And what firm are you a member of, if any?
149 A. Of the firm of F. S. Johnson & Co.
Q. And was that firm in business and doing business as bankers and millers in June and July 1886?
A. Doing business then as millers.
Q. You may state if you are the senior member of the firm.
A. Yes sir.
Q. And the Manager?
A. Yes sir.
Q. You may state if the firm, F. S. Johnson & Co., gave an obligation or note to the Capital National Bank, or to anyone for the Capital National Bank in June or July 1886 for $9968.00.
A. No sir.
Q. You would have had knowledge of it if any such transaction took place?
A. Yes sir, I would have had knowledge of it if it had taken place.
Q. Did you ever owe that bank such a note, or pay the bank such a note?
150–158 A. No sir.

Witness excused.

* * * * * * *

159 THE JONES NATIONAL BANK
vs.
MOSHER.

NEW YORK, *May* 21*st*, 1902.

LEONIDAS M. LAWSON, again being produced, testifies as follows:

Direct examination by Mr. BURR continued:

Q. What business were you engaged in during the year 1884 and prior thereto?
A. In the banking business.
Q. Where?
A. In the City of New York.
Q. And under what name or style?
A. The style of the firm was Donnell, Lawson & Simpson.
Q. Up to what period or date were you engaged in the banking business under the firm name and style of Donnell, Lawson & Simpson?
A. To May 14th, 1884.
Q. What connection, if any, did you have with the firm?
A. I was partner in the firm.
Q. State whether or not you were one of the managing partners of the firm?
A. Yes, I had to do with the general business of the firm, its management.
Q. And how long previous to May 14th, 1884, were you thus engaged?

A. Ever since the establishment of the firm, which was, I think, in about 1870.

Q. What happened or took place on the 14th of May, 1884?

160 A. The firm was compelled to suspend payment.

Q. In suspending payment what was done?

A. We immediately notified our clients, our customers, all over the country that we had suspended payment, and requested them to indicate where we should place any funds that were in transit coming to us for them.

Q. That isn't exactly what I mean. Was a receiver appointed?

161 A. Oh, yes, the firm made an assignment, and the assignee was Robert H. Weems.

Q. Made an assignment for the benefit of creditors?

A. Yes.

Q. What was the general nature of the business of the firm of Donnell, Lawson & Simpson prior to May 14th 1884?

A. We conducted a general banking business, we received deposits and paid on check or draft, and made discounts for our customers.

Q. You were, I might say a bank?

A. Yes, a bank, a general bank, general banking business.

Q. Are you familiar or were you familiar with the Marsh National Bank of Lincoln, Nebraska?

A. I know the bank, it was one of our correspondents, or one of our clients, kept an account with us.

Q. Kept an account with you when?

A. I don't know when the account began, but they were

162 keeping an account at the time of our suspension.

Q. Can you now state of your own recollection whether or not they had an account with your bank at the time of your suspension, May 14th, 1884?

A. I can so state, and I know it is a fact that they did have an account at the time we suspended on May 14th, 1884.

Q. Do you recall about how much money they had on deposit with you standing to their credit on May 14th, 1884?

A. I think it was over $25,000, probably $26,000.

163 Q. Do you know whether or not they had any security for that $25,000 or $26,000?

—. I don't know positively, but I am pretty sure they did not.

Q. To what class of creditors did they belong?

A. They were general creditors.

Q. Were they what you would call one of your general country accounts?

164 A. Yes.

Q. On the 14th of May, 1884, what happened so far as pertains to the possession and control of the business, property assets of the firm of Donnell, Lawson & Simpson?

A. Soon after the suspension the assignment was made for the benefit of our creditors, I think within a day or two, and Robert H.

Weems was the assignee, and all the property and assets of the firm were taken possession of by the assignee, and he proce-ded to administer upon them according to the laws of the State of New York.

Q. And about how long was he in possession of the business and assets and property of the firm of Donnell, Lawson & Simpson?

165 A. He retained control, possession and management of the business until the 20th of February, 1885.

Q. And on or about the 20th of February, 1885, what did he then do, if you know?

A. The property was turned back into the possession of the firm of Donnell, Lawson & Simpson, up to about the 20th of February, 1885, the date when the assignee reassigned and reconveyed to the firm, what did the members of that firm have to do with the business, property, assets and affairs of the old firm?

A. The members of the firm had nothing to do with the possession or control or management of the property, and the most they did do was to advise the assignee as to any business that might be proper for them to advise him about in the settlement of the estate, and the members of the firm were engaged in inducing the creditors to assent to a settlement which would result in their resumption of business.

Q. Are Mr. Donnell and Mr. Simpson now living.

166 A. No, they are both dead.

Q. And when did they die?

A. Mr. Donnell died, I thin-, in 1891, and Mr. Simpson I think in 1896.

Q. Who were the members of the firm of Donnell, Lawson & Simpson?

A. Robert W. Donnell, George E. Simpson and myself.

Q. Do you know what property the firm of Donnell, Lawson & Simpson had, or the individual members of that firm, which was not assigned to Weems as assignee?

A. I know none.

Q. Did they have any property to your knowledge other than that which was assigned?

167 A. None.

Q. Or means of paying their indebtedness other than out of the assigned estate?

A. None what ever; all property of every kind, nature and description of the firm of Donnell, Lawson & Simpson and the individual members thereof was assigned in possession as such assignee the firm and its members had no property or means whatsoever.

Q. Do you know whether or not the firm of Donnell, Lawson & Simpson or the individual members thereof, paid any of the general unsecured creditors of the firm during the month of May, 1884?

168 A. I know that they did not.

Q. Did they make any partial payments to the creditors?

A. They made payments to no creditors whatever.

Q. And is that true of the whole period of time during which Mr. Weems was in possession as assignee?

169 A. Yes, that is true; during the time that the assignee was in possession no payment whatever was made by any member of the firm to any creditor.

Q. Do you know whether or not during this period Mr. Weems as assignee made any payments to any creditors of Donnell, Lawson & Simpson?

A. He made no payments to the creditors of Donnell, Lawson & Simpson except to clear off the secured debts, the debts that the firm owed for which collaterial had been pledged.

Q. Can you state whether or not the Marsh National Bank of Lincoln, Nebraska, had any collateral as security to their indebtedness?

170 A. They did not.

Q. Do you know whether or not during the month of May, 1884, the firm of Donnell, Lawson & Simpson or any member thereof paid to the Marsh National Bank any sum of money what ever or gave to it any note of hand?

A. They did not; they paid no money to the Marsh National Bank and gave no obligation to it of any sort during that time.

Q. Can you tell me what Mr. Weems reassigned to the firm of Donnell, Lawson & Simpson on or about the 20th of February 1885?

171 A. When the assignee was discharged he reassigned to the firm of Donnell, Lawson & Simpson all of the property and assets which he had received except what had been necessary to pay the expense of his administration as assignee and what had been necessary to pay off the secured loans.

Q. Are you or were you acquainted with or familiar with the Capital National Bank of Lincoln?

A. I know that that bank, the Capital National Bank, was the successor of the Marsh Bank.

Q. When did that succession take place?

A. About June or July, 1884.

Q. Upon resumption of business by the firm of Donnell, Lawson & Simpson, or prior thereto or afterwards, do you know whether or not that firm paid to the Marsh National Bank or the Capital National Bank any sum of money whatever on account of the claim of the Marsh National Bank against the firm of Donnell, Lawson & Simpson?

172 A. Yes, I know.

Q. Will you state whether they did *not* not?

A. No, they did not. About the time of the discharge of the assignee they executed notes due in one year and two years for the indebtedness to the general creditors.

Q. And what notes did they execute, if any, to the Marsh or Capital National Bank?

173 A. They executed notes to them just as to all other general creditors, one half of the amount of the indebtedness of Donnell, Lawson & Simpson to them represented in one note, due one

year after the date, and the other half of the indebtedness represented by a note due two years after date.

Q. What other, further or different note or notes did the firm of Donnell, Lawson & Simpson execute to the Marsh or Capital National Bank.

A. None whatever.

Q. Do you know whether or not the note given to the Capital National Bank by the firm of Donnell, Lawson & Simpson for fifty per cent. of the indebtedness of Donnell, Lawson & Simpson to the Capital National Bank due in one year from its date was ever paid?

174 A. I don't know.

Q. Do you know whether or not the second note was paid?

A. Yes, I know that was not paid.

Q. Do you know whether or not on the 14th day of October, 1884, the firm of Donnell, Lawson & Simpson made and delivered to the Capital National Bank of Lincoln, Nebraska, their two notes, as follows: One for $4695.79 and the other for $5084.76?

A. They made no such notes; I know that I personally made no such notes, and from my intimate knowledge and management of the affairs of the business at that time I know that the other members of the firm made no such notes.

Q. Do you know whether or not the firm of Donnell, Lawson & Simpson made and delivered to the Capital National Bank

175 of Lincoln, Nebraska, on the 20th day of July, 1885, their note for $9,391.57, and again on the 24th of July, 1885, their note for $9,391.56?

A. I know that I personally made no such notes; and from my intimate knowledge of the management of the affairs and business at that time I know that the other members of the firm made no such notes.

Q. Do you know whether or not the firm of Donnell, Lawson & Simpson made and delivered to the Capital National Bank of Lincoln, Nebraska on the 13th day of August, 1885, their note for $10,000 and on the same date their note for $20,300?

176 A. I know that I personally made no such notes, and from my intimate knowledge and management of the affairs and business at that time I know that the other members of the firm made no such notes.

Q. Do you know of your own knowledge whether or not anything was paid to the Capital National Bank for or on account of the notes which I have just enumerated to you?

A. I know that nothing was paid upon those notes, the firm gave no such notes.

Q. Do you know whether or not any one was authorized by the firm to give such notes?

177 A. No one ever had authority to execute such notes.

Q. Do you know whether or not during the month of May, 1884, any money was paid by the firm of Donnell, Lawson & Simpson or the individual members thereof to the Chemical National Bank of New York for and on account of the indebtedness

due from Donnell, Lawson & Simpson to the Marsh National Bank?

A. I know of no such payments having been made.

Q. And if they had been you would know it?

A. I would have known it, yes.

Q. Were any payments made to any one or any firm
178-181 or corporation for or on account of this indebtedness of about $25,000 or $28,000 due the Marsh National Bank during the month of May, 1884, after the suspension of Donnell, Lawson & Simpson?

A. No such payment was made.

* * * * * * *

182 THE JONES NATIONAL BANK
vs.
MOSHER.

NEW YORK, *May 22nd*, 1902.

WILLIAM AYRES, JR., of lawful age, being by me first duly examined cautioned and solemnly sworn as hereinafter certified, deposeth and saith, as follows:

Q. State your name, age, residence and occupation?

A. William Ayres, Jr.; age 37 years; residence 342 West 85th Street, New York City; occupation banking.

Q. Of what institution are you now an employe?

A. Chemical National Bank of New York.

Q. How long have you been in the service of the Chemical National Bank of New York?

A. Since October 4, 1880.

Q. And what is your official position now?

A. Clerk and assistant to the officers.

Q. And what are your particular duties?

A. With other capacities I have charge of the records.

Q. In the management of the affairs of the bank what comes under your immediate supervision?

A. Caring for the records, books of account, etc.

Q. Who has the immediate charge of all the records, both books of original entry, ledgers, correspondence, deposit slips, etc.?

A. I have.

Q. And how long have you had immediate charge of such records and books?

A. For twenty years.

Q. For twenty years last past?

A. Yes, 1882 to 1902.

Q. And during all that period have all the books, records and papers of the bank been in your custody and control?

A. Yes sir.

183 Q. And who is charged with the responsibility of the safekeeping of these books and records?

A. I am.

Q. Are you or were you acquainted with the Marsh National Bank of Lincoln, Nebraska?

A. I was, with its account on our books.

Q. During what period?

A. In 1884 and for some time prior thereto.

Q. And were you acquainted with the Capital National Bank of Lincoln, Nebraska?

A. I was.

Q. During what period?

A. From the time of its organization.

Q. Down to when?

A. Its failure. I was acquainted with its account on our books.

Q. Did the Marsh National Bank of Lincoln, Nebraska do business with the Chemical National Bank?

A. Yes,—at that time,—1884.

Q. Up to about the last of May, 1884?

A. Yes sir.

Q. Did the Capital National Bank of Lincoln, Nebraska, do business with the Chemical National Bank?

A. Yes, from about June 2, 1884 to the date of their failure; 1893 I believe.

Q. What was the nature of that business?

A. General banking, receiving of remittances and charging to their account of all drafts, etc., drawn by them that were honored by us at that time.

Q. It was a general banking account?

A. Yes.

184–200 Q. And you were, I might say, what is known as their New York correspondent?

* * * * * * *

201 Q. Assuming that the Marsh National Bank of Lincoln, Nebraska charged the Chemical National Bank with $10,000 on the 19th of May, 1884, with the memorandum against it "D. L. & S., have you been able to find a corresponding credit on the account of the Chemical National Bank by this process of elimination, which you have explained in your testimony?

202–205 A. I have not.

Q. From what you have been able to accomplish and learn in this elimination of the charges and credits kept between these two banks, are you able to state whether the Chemical National Bank ever received and gave credit to the Marsh National Bank for an item of $10,000 entered on Exhibit B as charged by the Marsh National Bank against the Chemical National Bank on May 19th, 1884, with the memorandum marks against it "D. L. & S."?

206–212 A. Apparently the item in question was never received and credited to the Marsh National Bank.

* * * * * * *

213 Q. Have you in your bank at this time a record or book in which was kept an account with the Capital National Bank during the months of December, 1885, and January, 1886?

214-239 A. We have the ledger which contains the accounts of the Capital National Bank at those dates.

* * * * * * *

240 & 241 Mr. I. A. BAKER, called as a witness on behalf of the Plaintiffs and being first duly sworn testified as follows,—

* * * * * * *

242 At a session of the Circuit court of the United States for the District of Nebraska, continued and held pursuant to adjournment at the United States Court Room, in the City of Lincoln on the 10th day of January 1894, the Honorable Elmer S. Dundy, Judge being present and presiding in said Court, the following among other proceedings were had and done to-wit:—

39 "Q."

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln,
vs.
CHARLES W. MOSHER.

Default and Judgment.

Now comes the plaintiff herein, and the defendant being in default for answer and demurrer, the court finds that the allegations of the petition are confessed by him to be true and find that said defendant Charles W. Mosher is indebted to the plaintiff Kent K. Hayden, Receiver of the Capital National Bank of Lincoln, Nebraska, in the sum of $84,294.48.

It is therefore considered by the court that the said plaintiff recover from the said defendant the said sum of Eighty four thousand Two hundred Ninety four and 48/100 ($48,294.48) Dollars and $— costs herein expended and that execution issue therefor.

THE UNITED STATES OF AMERICA, *District of Nebraska, ss:*

I, Elmer D. Frank, Clerk of the Circuit Court of the United States for the District of Nebraska Do Hereby Certify that the above and foregoing is a true copy of an order entered upon the Journal of the Proceedings of said court, in the cause therein entitled; that I have compared the same with the original entry of said order and it is a true transcript therefrom, and of the whole thereof.

Witness my official signature and the seal of said court, at Omaha in said District this 2nd day of January, A. D. 1895.

[SEAL.] ELMER D. FRANK, *Clerk.*

Filed in District Court 1–5–'95 4 P. M.
A. J. NEWMAN, *Clerk.*

Ex. 991.

243 Q. I will ask you if that judgment has been satisfied of record, have you ever examined the record?

Q. Please examine the record and see.
(Witness examines record.)
A. No sir.
Q. Has any portion of the judgment been paid and satisfied?
A. None whatever. No credits on here at all.

* * * * * * *

244 Q. You may state if any portion of the judgment represented in Exhibit No. 992 has been paid or credited.
A. No sir, no credits whatever.

* * * * * * *

244½ Exhibit No. 992 received and read in evidence as follows:—

245 At a session of the Circuit Court of the United States for the District of Nebraska, continued and held pursuant to adjournment, at the United States Court Room, in the city of Lincoln, on the 9th day of February 1894, the Honorable Elmer S. Dundy, Judge being present and presiding in said Court, the following among other proceedings were had and done to-wit:—

46 "Q." KENT K. HAYDEN, Receiver,
vs.
CHARLES W. MOSHER ET AL.

Now come the parties hereto by their attorneys and both parties consenting in open court that Judgment may be entered herein in favor of said plaintiff and against said defendants for the sum of $36,428.10

It is therefore considered, ordered and adjudged by the court that said plaintiff Kent K. Hayden Receiver of the Capital National Bank of Lincoln, Nebraska, have and recover of and from the said defendants Charles W. Mosher, and Richard C. Outcalt doing business as Mosher — Outcalt, the said sum of Thirty six thousand Four Hundred Twenty eight, and 10/100 ($36,428.10) Dollars together with $— costs of this action, and that execution issue therefor.

THE UNITED STATES OF AMERICA, *District of Nebraska, ss:*

I, Elmer D. Frank Clerk of the Circuit Court of the United States for the District of Nebraska, Do Hereby Certify that the above and foregoing is a true copy of an order entered upon the Journal of the Proceedings of said Court, in the cause therein entitled, that I have compared the same with the original entry of said order and it is a true transcript therefrom and of the whole thereof.

Page 1 Ex. 992.

246 Witness my official signature and the seal of said court, at Omaha, in said District this 2nd day of January, A. D. 1895.
[SEAL.] ELMER D. FRANK, *Clerk.*

Filed in District Court 1-5-95 4 P. M.
A. J. NEWMAN, *Clerk.*

Page 2 Ex. 992.

247 Q. I now hand you Exhibit No. 993 and will ask you if that is a part of the records and files of your office?

A. Yes sir.

Q. And is now in your custody as Clerk of the District Court?

A. Yes sir.

Q. You may state if that judgment has been, any portion of it, collected or paid.

A. No sir, I believe not. The record don't so show.

Q. You may state if any portion of that has been paid, Exhibit No. 993.

A. No sir.

Mr. NORVAL: I now offer in evidence Exhibit No. 993.

248 Exhibit No. 993 received and read in evidence as follows:

249 Transcript of Proceedings Lately had Before A. C. Montgomery, County Judge in and for the County of York, in the State of Nebraska, between,

No. 740.

SARAH A. BROWN, Plaintiff,
and
EDWIN W. MOSHER, Defendant.

SEPT. 24", 1894.

Plaintiff filed two bonds each in the sum of $400.00 with three coupons attached to each bond in the sum of $14.00 which bonds and coupons are dated Oct. 18th 1889. Part of said coupons attached to said bonds are past due and the principal of each bond is due Nov. 1" 1894. On which bonds and coupons the plaintiff asks judgment. The said bonds and coupons are — too great length to record in the Docket. The defendant on the same day on which the bonds and coupons were filed in this office appeared personally and waived process and entered his appearance in this cause and with the consent and at the request of the plaintiff the said defendant confessed that he is indebted to the plaintiff upon said coupon bonds and coupons attached in the sum of $889.85. And asks to have judgment rendered against him therefore. It is therefore considered by me that the said plaintiff Sarah A. Brown recover from the said *said* defendant Edwin W. Mosher the sum of $889.85 with costs of this action taxed at $1.80. This judgment to draw interest at the rate of ten per cent. from Nov. 1" 1894.

A. C. MONTGOMERY,
County Judge.

Judge's Fees.

Docketing	.25
Filing papers	.30
Judgment	.50

Ex. 993.

250

Record	.25
Ent. Vol. App. Deft	.25
Satisfaction	.25
	$1.80
Transcript	.75
Paid by Plaintiff	$2.55

STATE OF NEBRASKA, *York County, ss:*

I, A. C. Montgomery County Judge in and for York County and said state do hereby certify that the above is a full and correct copy of my docket of all the proceedings had before me in said cause.

[SEAL.] A. C. MONTGOMERY,
County Judge.

Filed in Dist. Court Oct. 8th, 1894. 5 P. M.
A. J. NEWMAN, *Clk.*

Page 2 Ex 993.

251 Q. I now hand you Exhibit No. 994, and will ask you if that is a part of the records and files of your office?

A. Yes sir.

Q. And now in your custody as Clerk of the District Court of York County?

A. Yes sir.

Q. You may state if that Judgment has been entered upon the Judgment Record, and indexed in York County as required by law.

A. Yes sir.

Q. Has any portion of that Judgment been collected or paid?

252 A. No sir, no entries upon the Judgment docket whatever.

Mr. NORVAL: I offer in evidence Exhibit No. 994.

Exhibit No. 994 received and read in evidence being as follows:—

253 EX. 994.

County Judge in and for the County of York, in the State of Nebraska, between

No. 739.

SARAH A. BROWN, Plaintiff,
and
EDWIN W. MOSHER, Defendant.

SEPT. "24," 1894.

Plaintiff filed two bonds each in the sum of $400.00 with three coupons attached to each bond in the sum of $14.00 which bonds

and coupons are dated Oct. "18" 1889, part of said coupons attached to said bonds are part due and the principal of each bond is due Nov. "1" 1894. On which bonds and coupons the plaintiff asks judgment. The bonds and coupons are at *two* great length to record in the Docket. The defendant on the same day on which said bonds and coupons were filed in this office appeared personally and waived process and entered his appearance in this cause and with the consent and at the request of the plaintiff, the said defendant confessed that he is indebted to the plaintiff upon said coupon bonds and coupons attached in the sum of $889.85. And asks to have judgment rendered against him therefor.

It is therefore considered by me that the said plaintiff, Sarah A. Brown recover from the defendant the sum of $889.85 with costs of this action taxed herein at $1.80. This judgment to draw interest at the rate of 10 per cent. from Nov. "1" 1894.

A. C. MONTGOMERY,
County Judge.

Judge's Fees.

Docketing	.25
Filing papers	.30
Judgment	.50
Record	.25
Ent. Vol. App. Deft.	.25
Satisfaction	.25
	1.80
Transcript	.75
Paid by Plaintiff	2.55

Ex. 994. P. 1.

254 STATE OF NEBRASKA, *York County, ss:*

I, A. C. Montgomery, County Judge in and for York County and State of Nebraska, do hereby certify that the above is a full and correct copy of my docket as all the proceedings had before me in said cause.

Dated this 4th day of October 1894.

[SEAL.] A. C. MONTGOMERY,
County Judge.

Endorsed: Filed Oct. 8th 1894. 5 P. M. A. J. Newman, Clerk.

Ex. 994. P. 2.

255 Q. I now hand you Exhibit No. 995 and will ask you to state whether or not that is a part of the documents and files of your office as Clerk of the District Court of York County, Nebraska?

A. Yes sir.

Q. And is it in your possession as such officer?
A. Yes sir.
Q. You may state if that judgment has been entered up on the judgment record and indexed in the court records of York County.
A. Yes sir it is.
Q. You may state if any portion of that judgment has ever been paid.
A. No sir none whatever.

Mr. NORVAL: I now offer in evidence Ex. No. 995.

256 Exhibit No. 995 is received and read in evidence as follows:—

257 Transcript of Proceedings lately had before A. C. Montgomery, County Judge in and for the County of York, in the State of Nebraska, between

No. 741.

SARAH A. BROWN, Plaintiff,
and
EDWIN W. MOSHER, Defendant.

SEPT. 24TH, 1894.

Plaintiff filed two bonds in the sum of $400.00 with three coupons attached to each bond in the sum of $14.00 which bonds and coupons are dated Oct. 18" 1889. Part of said coupons attached to said bonds are past due and the principal of each bond is due Nov. 1" 1894. On which bonds and coupons the plaintiff prays judgment. The said bonds and coupons are of too great length to record in the docket The defendant on the same day, on which the bonds and coupons were filed in this office appeared personally, and waived process, and entered his appearance in this cause, and with the consent and at the request of the plaintiff the said defendant confessed that he is indebted to the said plaintiff upon said coupon bonds and coupons attached in the sum of $889.85, and asks to have judgment rendered against him therefor. It is therefore considered by me that the said plaintiff Sarah A. Brown recover from the said defendant Edwin W. Mosher the sum of $889.85 with costs of this action taxed herein at $1.80.

Filed in Dist. Court Oct. 8th, 5 P. M., 1894.

H. J. NEWMAN, *Clk.*

258–279 No. 741.

This judgment to draw interest at the rate of ten per cent. per annum from No-. 9" 1894.

A. C. MONTGOMERY,
County Judge.

Judge's Fees.

Docketing	.25
Filing papers	.30
Judgment	.50
Record	.25
Ent. Vol. App. Deft.	.25
Satisfaction	.25
	$1.80
Transcript	.75
Paid by Plaintiff	$2.55

STATE OF NEBRASKA, *York County, ss:*

I, A. C. Montgomery County Judge in and for York County, and said state do hereby certify that the above is a full and correct copy of my docket of all the proceedings had before me in said cause.

Dated this 4th day of October 1894.

[SEAL.] A. C. MONTGOMERY,
County Judge.

Ex. 995.

280 Mr. G. W. SHRECK, called as a witness on behalf of the plaintiffs and bein- first duly sworn, testifies as follows:—

Direct examination.

By Mr. R. S. NORVAL:

Q. Where do you reside?
A. York.
Q. What is your business at present?
A. I am in the real estate business.
Q. What official position did you hold in York County in 1890 and subsequent and prior?
A. I was Sheriff of York County.
Q. How long were you Sheriff?
A. From 1888 to 1893.
Q. You may state if you were well acquainted with one W. A. Sharar, who lived in York County?
A. Yes sir.
Q. Were you acquainted with his financial standing up to 1893?
A. Yes sir.
Q. You may state if you know whether or not he was solvent or insolvent?
281 He was insolvent.
Q. And how long had he been insolvent?
A. Oh, for a number of years before that, I don't remember now.
Q. About how long had you known him?

A. I had known him about,—since 1880.

Q. And he has been insolvent ever since?

A. He has been insolvent since 1887 anyway.

Q. Did you know one Mr. Stark, that lived there, that was in business with Mr. E. W. Mosher?

A. Arthur M. Stark?

Q. Yes sir.

A. Yes sir.

Q. You may state how long you knew Mr. Arthur M. Stark?

A. I knew him since he came to York County I suppose, about eight or ten years. I knew him from the time he came there until he left.

Q. You knew him for about eight or ten years, now when did he leave there, about how long ago?

A. He must have left there along in 1892, somewheres along there, from 1890 to 1892.

282 Q. With reference to the time of the failure of the Capital National Bank, which was on January 21st, or 23rd, 1893, how long had he left before that?

A. Oh, some two or three years before that, is my recollection.

Q. You may state if you knew anything about his financial condition while he resided there in York?

A. That is a pretty hard question to answer "yes" or "no."

Q. The question is, do you know.

A. Yes sir.

Q. Now you may state what was his financial condition at that time with reference to solvency or insolvency.

A. He was always consider- insolvent.

Q. And for how long?

283 A. I think during the whole time he was there.

Q. You may state if you were acquainted with one Edwin W. Mosher

A. Yes sir.

Q. How long did you know him?

A. Oh, I had known him for fifteen years or more.

Q. You knew him from the time he came to York?

A. Yes sir.

Q. You were there when he came?

A. I think so, yes sir.

Q. About when did he leave York?

A. He left York in 1893, I think.

Q. Before or after the bank failure, the Capital National Bank failure?

A. It was afterwards, I think.

Q. You may state if you were acquainted with his financial standing and condition from 1890 up to 1893 the time of the failure of the Capital National Bank?

A. Yes sir.

Q. You may state what his condition was as to solvency or insolvency.

284-295 A. From the latter part of 1890 to 1893 he was considered insolvent.
Q. From the latter part of 1890 to 1893?
A. Yes, that is he was execution proof, supposed to be.
Q. You have known him since then?
A. No sir, not since he left York.
Q. Has he ever returned to York, since he went away?
A. Not that I remember of.

Mr. NORVAL: That is all
No cross examination.
Witness excused.

* * * * * * *

296 Mr. C. W. HAMILTON, called as a witness on behalf of the Plaintiffs and being first duly sworn testified as follows:—

Direct examination.

By Mr. THOMAS:

Q. You may state your name?
A. Charles W. Hamilton.
Q. You reside in Omaha, this state?
A. I do.
Q. How long have you resided there?
A. I was born there.
Q. How old are you?
A. I was born October 9th, 1859.
Q. What is your occupation?
A. Banker.
Q. With what bank are you connected?
A. United States National.
Q. In what capacity?
A. At present as Vice President.
Q. How long have you been connected with that bank?
A. Since its organization.
Q. What was the date of its organization?
A. June,—I couldn't remember the exact date, but it was June 1883.
Q. And you have been connected with the institution ever since its organization?
A. Yes sir.
Q. You may state if you were in the bank and connected with it during the month of June 1886.
A. Yes sir.
Q. Were you an officer of the bank at that time?
A. I think I was.
Q. In what capacity?
A. I think I was Assistant Cashier.
297 Q. I will ask you what book this is I now hand you?
A. That is what is commonly called in a bank, a Balance Book, a form of ledger.

Q. Is that one of the books of the United States National Bank, of which you are an officer?

A. It is.

Q. Was that book kept and used in the current work of the bank during the month of June 1886?

A. For the month of June 1886.

Q. Was used and kept in the regular and ordinary course of business?

A. Used and kept in the regular and ordinary course of business.

Q. Does it contain the transactions and current work of the bank during that month?

A. It contains certain accounts that were kept under the letters "A" to "K" during that month.

Q. You may state the nature of the accounts that were kept in that book.

A. They were accounts of individuals, firms and banks, whose title or name began with the letters from "A" to "K," and during the month of June 1886.

298 Q. Does that book contain the account of your bank, with Capital National Bank during the month of June 1886?

A. It contains the account of the Capital National Bank with the United States National Bank during the month of June 1886.

Q. Are all the transactions that the United States National Bank had with the Capital National Bank of Lincoln, during the month of June 1886 contained in that book?

A. All the credit and debit transactions would appear in this book.

Q. Now I will ask you to examine that book and state if on or about the 21st day of June 1886 the United States National Bank of Omaha, credited the Capital National Bank of Lincoln Nebraska with an item of $20,000.00.

A. I have examined the book and there is no credit so much as $20,000.00 during the month of June.

Q. Of 1886.

A. 1886.

Q. Is there anything on that book during that month that would indicate a transaction of that kind with the Capital National Bank during the month of June 1886?

299 A. There is nothing I have been able to find of a credit *of a credit* as large as that amount.

Q. If any transaction were had which would entitle the Capital National Bank of Lincoln in your course of business, to a credit, would that amount of credit appear upon this book?

300–317 A. Why, I believe it would.

Q. Could it properly appear upon any other book?

A. Why, no book that I know of.

Q. You may state if that book you have in your hands, and to which you have referred is a book of original entry.

A. I believe it is a book of original entry, it is understood as such.

Q. Is it in fact, such?

A It is in fact a book of original entry.

Mr. THOMAS: That is all.

* * * * * * *

318 Page 15, Section 17.

"No officer or clerk of this bank shall pay any check drawn upon it, or pay out money on any order, unless the drawer of such check or order, at the time of the presentation thereof, have on deposit in the bank funds sufficient to meet such check or order.

* * * * * * *

319–322 Page 17, Sec. 26.

"The Board of Directors shall appoint at their option, a committee of three members thereof, (including the president) whose duty it shall be to examine every twelve months at least the affairs of this bank, to count its cash and compare its assets, and liabilities with the accounts of the General Ledger, ascertain whether these accounts and all others are correctly kept, whether the condition of the bank corresponds therewith, and whether the bank is in a sound and solvent condition, and to reccommend to the board, such changes in the manner of doing business &c. as shall seem desirable, the result of which examination shall be reported to the board at the next regular meeting thereafter.

* * * * * * *

323 Page 36.—Special Meeting.

"At special meeting of Directors held May 23, 1884, at office of Marsh National Bank, there were present W. A. Sharar E. W. Mosher, R. C. Outcalt, and C. W. Mosher.

On motion of Mr. Outcalt the name of the bank shall be Capital National Bank after May 31st, at close of business on that day, and that out of the undivided profits as shown by books at close of business May 31st, $1500.00 shall be carried to surplus a/c, and the balance of profits shall be divided among stockholders in lieu of regular July dividend.

That on June 1st, the Capital stock of this bank shall be increased to $200,000. and proper notification of the same be forwarded to the Comptroller of Currency.

Resignation of C. W. Marsh as Vice Prest. having been received same was accepted and H. J. Walsh elected to fill the vacant place, to commence at close of business on May 31st, 1884.

From Ex. 26 P. 6.

324–339 The number of directors having been increased to seven C. E. Yates and E. P. Hamer were elected to make up the number to commence May 31st, 1884.

Messrs. R. C. Outcalt, C W. Marsh, E. W. Mosher, W. A. Sharrar resignation- having been handed in, same was excepted and the names of A. P. S. Stuart, W. W. Holmes, R. O. Phillips, and D. E.

Thompson proposed in their places and were duly elected to take office at close of business May 31st, 1884.

Adjourned.

C. W. MOSHER, *Pt.*

R. C. OUTCALT, *Sec'y.*

* * * * * * *

340 H. J. WHITMORE, called as a witness on behalf of the plaintiffs and being first duly sworn, testified as follows:—

Direct examination.

By Mr. THOMAS:

Q. You may state your name?
A. H. J. Whitmore.
Q. Where do you reside?
A. At Lincoln, Nebraska.
Q. What is your occupation?
A. I am an attorney.
Q. What has been your occupation during the past ten years, or so.

A. I have practiced law, and have been a National Bank Examiner, also Receiver of a National Bank during that time.

Q. When were you a National Bank examiner?
A. From July 1894, until the First of February 1889.

Q. What was the nature of the work you had to do in connection with that office?

A. Perform the duties generally of a National Bank examiner, make examinations of National Banks in the State of Nebraska, and elsewhere, if directed by the Comptroller of the Currency. Such examinations as are required by the Comptroller to be made by examiners, inspection of the books, examine the assets, count the cash and verify the accounts.

Q. Were you continuously engaged in that class of work while you were bank examiner?
A. Yes sir.
Q. When did you act as Receiver?

A. From the first of February until the first of January
341 last. I was temporary Receiver of the bank from about the 19th of October 1898, until I was appointed permanent Receiver the first of February 1899. Several months I acted as temporary Receiver. I was permanent Receiver of the same bank.

Q. Of what bank were you Receiver?
A. First National Bank of Neligh, Nebraska.

Q. Do you sustain any relation at this time in connection with the office of the Comptroller of the Currency, referring to whether you have in your custody any books, and documents of the Capital National Bank.

A. I have charge of such books and records of the Capital National Bank of Lincoln that have been brought here for use in this trial. I have receipted to them, that is receipted to the Comptroller for the books, or to his representative who was here.

Q. Did you receive the books from Mr. Lynch who was here for the department?

A. Yes sir.

Q. Now I will ask you to state if you have made an examination of the books in the hands of the Receiver of the Capital National Bank.

A. I have to some extent.

Q. To what extent?

A. Well I have gone over quite a number of books and records of the bank in relation to certain matters.

Q. How extensively have you gone into that?

A. Well I have examined different accounts, and different books from the time of the organization of the Marsh National Bank down to the failure of the Capital National Bank.

Q. Have you examined any of the books prior to that time, of Marsh Brothers Mosher & Co.?

A. I have.

Q. Did you examine the book known as "Ledger of Marsh Bros. Mosher & Co. No. 1 which is identified as Exhibit 9?

A. I have.

342 (Reporter identifies Exhibit No. 9.)

Q. Have you examined the Ledger of the Marsh National Bank identified by the reporter as Exhibit No. 10?

A. I have.

Q. Have you made comparisons between these two books to ascertain whether or not accounts of the Ledger of Marsh Bros. Mosher & Co., have been transferred to the Ledger of the Marsh National Bank?

A. I have.

Q. I will ask you to state whether or not the accounts as they appear in the Ledger of Marsh Bros. Mosher & Co., have been transferred to the Ledger of the Marsh National Bank.

343 & 344 A. They have not in every instance.

Q. Have they in general?

A. I think in general the accounts were transferred correctly from Marsh Bros. Mosher & Co., to the Marsh National.

* * * * * * *

345 Q. Have you examined the Ledger account to ascertain about how much Donnell, Lawson & Simpson were owing the Marsh National Bank about 14th day of May 1884?

346 A. I have.

Q. You may state about how much the books of the Marsh National Bank show that Donnell, Lawson & Simpson owed the bank at about the time stated.

A. Something like $30,000.00.

Q. Calling your attention to Journal of the Marsh National Bank referred to as Exhibit 1, I will ask you to examine that book and state if you find in it an entry by which the firm of Donnell,

Lawson & Simpson are given credit on the books of the Marsh National Bank?

347 A. I do.

Q. You may state where you find that entry giving the page.

A. On page 532 of Journal 1, of the Marsh National Bank, under date Monday May 19", 1884.

Q. Upon what line does that entry referred to appear?

A. I find four credits to Donnell, Lawson & Simpson on this date.

Q. Upon what lines do they appear commencing from the top of the page after the date line?

A. The first is $10,000.00 on line 14 from the top. The second is $3,048.88 on line 15 from the top, the third is $2,000.00 on line 16 from the top, and the 4th is $2.00 on line 17 from the top.

Mr. THOMAS: We offer in evidence lines 14-15-16 & 17 on page 532 of exhibit 1, counting from the top.

348 Entries offer- received and read in evidence, as follows, the same being marked Exhibit No. 998.

"MONDAY, *May 19th*, '84.

159,	Donnell, Lawson & Simpson		$10,000.
159,	"	Transfer'd to Chem	3,048.88
159,	"	" " "	
		Rem. Beatrice	2,000.
129,	"	Int. on Discounts "April"	2.
			$15,050.88

* * * * * * *

Q. What does the posting of those items in the right hand column of this account, indicate?

349 A. Indicates a Credit to the account of Donnell, Lawson & Simpson.

Q. Upon what lines commencing from the top of the page, 159 are those entries posted?

A. Lines 29, 30, 31 & 32 from the top of the page.

Mr. WHEDON: What are those figures you just made in that book?

A. They are the numbers of the lines from the top of the page.

Q. Have you in your examination of these books made figures in that way as you have examined them?

A. No sir.

Mr. THOMAS: We offer in evidence lines counting from the top, number 29–30–31 and 32, on the credit side of the Ledger 1, Exhibit No. 10, on page 159, being the account of Donnell, Lawson & Simpson.

No objection.

Entries received and read in evidence, marked Exhibit No. 999, as follows:—

159.

Donnell, Lawson & Simpson.

	1884.			
	May 19.		532	$10,000.
350	"	Trans. to Chemical.....	"	3,048.88
	"	" " Beatrice	"	2,000.00
	"	Int. Dscts.....	"	2.00

Q. You may state what is indicated by the figures 5–3–2 which appear in these entries.

A. Those refer to the pages of the Journal on which those entries were first written.

Q. Again calling your attention to the Journal just referred to and on page 533 thereof, I will ask you if you find on that page an entry showing a charge to the Chemical National Bank amounting to $10,000.00?

A. I do.

Q. What is the date of that entry?

A. Monday May 19th, 1884.

Q. Is there an account with the Chemical National Bank, contained in the Ledger of the Marsh National Bank?

A. Yes sir, page 358, Ledger 1, Marsh National Bank.

Q. Is that account of the Marsh National Bank, with the Chemical National Bank of New York?

A. Yes sir.

Q. You may state if on May 19th, 1884, the sum of $10,000.00 is charged to the account of the Chemical National Bank of New York, on the Journal and Ledger of the Marsh National Bank just referred to.

A. Yes sir, it is.

Q. Upon what line of the Journal do you find that entry?

A. Line 29 from the top.

Mr. THOMAS: We offer in evidence line 29 from the top of page 533 of Exhibit 1.

351 The entry offered is received and read in evidence and marked Exhibit 1000, as follows:—

"MONDAY, *May* 19/84.

358. Chemical Nat. Bank D. L. & S..... $10,000.00

Q. What is indicated by the initials "D. L. & S."

Q. State if you can tell from an examination of the books and *and* your knowledge of bookkeeping what is referred to and indicated by the letters "D. L. & S."

352 & 353 A. From an inspection of all the entries on both the debit and credit side of the Journal for that date I should say that the letters "D. L. & S." referred to Donnell, Lawson & Simpson.

* * * * * * *

354 Q. I will ask you to state Mr. Whitmore if you find any other credits to the account of Donnell, Lawson & Simpson on the books of the Marsh National Bank during the month of May 1884?

A. I do,—page 538 of Journal 1, of the Marsh National Bank.

Q. I will ask you if you find a credit to this firm on the books of the Marsh National Bank on May 26th 1884.

A. Yes sir, on page 544 of Journal 1, of the Marsh National Bank.

Q. On what line commencing from the top?

A. On the 20″ line from the top.

Mr. THOMAS: We offer in evidence the 20″ line from the top on page 544, under date of May 26th 1884, of Journal 1, of the Marsh National Bank, identified as exhibit 1.

355 The offer received and read in evidence, as follows:—

544. MONDAY, *May* 26, '84.

159. Donnell, Lawson & Simpson..... $10,000.00."

Q. You may state Mr. Whitmore if that entry is posted or transferred to the corresponding Ledger of the Marsh National Bank?

A. It is so transferred.

Q. To what page of what book?

A. Page 159, Ledger 1 of the Marsh National Bank, on the 25th line from the top in the right hand column.

356 Q. Does that indicate the Credit column of that account?

A. Yes sir.

Q. What is the effect of that entry upon the account of Donnell, Lawson & Simpson?

A. It shows a payment by Donnell, Lawson & Simpson to the Marsh National Bank.

* * * * * * *

357 The entry offered received and read in evidence, being as follows,—(Exhibit #1002.)

1884. 159.

May 26th,—page 544 of the Journal, Cr..... 10,000.00."

Q. I will ask you Mr. Whitmore if you find a credit to the account of Donnell, Lawson & Simpson on the books referred to, under date of May 27th, 1884?

A. I do, On page 546, Tuesday May 27th, 1884.

Q. On the Journal of the Marsh National Bank?

A. Journal 1, Marsh National Bank.

Q. What line?

A. 16th line from the top.

Mr. THOMAS: We offer in evidence the entry on the 16th line from the top.

358 The entry offered is received and read in evidence as follows;—(Exhibit 1003)

"546. TUESDAY, *May* 27/84.
159. Donnell, Lawson & Simpson. To Bal. a/c..... $8174.70."

Q. You may state if that entry was transferred to the books of the,—
A. Transferred to line 36 from the top of the page, under the right hand column of page 159, Ledger 1, Marsh National Bank.
Q. The account of Donnell, Lawson & Simpson?
A. The account of Donnell, Lawson & Simpson.
Q. What was the effect of that entry?
A. It was a credit to Donnell, Lawson & Simpson in that amount.

Mr. THOMAS: We offer in evidence entry on line 36 in the right hand column, page 159, of Exhibit 10, also the heading of the page, the year, month and date.

359 The entry offered is received and read in evidence as follows,—(Exhibit No. 1004)

"159. 1884.
May 27th, To bal. a/c,— 546. $8174.70."

Q. I will ask you to state if you have made an examination of the books of the bank, of the Marsh National, to ascertain if any notes, or Bills Receivable of Donnell, Lawson & Simpson were taken into the bank and entered in its assets subsequent to the month of May 1884?
A. I have.
Q. You may state whether you find any.
A. Yes sir, I have found entries on the books showing notes of Donnell, Lawson & Simpson taken by the Marsh National Bank subsequent to May 1884.
Q. Calling your attention again to the items appearing on the Journal of the Marsh National Bank under date of May 27th 1884, I will ask you to state if you find any entry on that date indicating that a note of Mr. Moshers was taken into the bank, as part of its assets on that day?
A. I find that there is a record of a note by Mosher, taken on that day.
Q. Where does that entry appear?
A. On the 4th line from the top of page 547, under date of May 27th, 1884.

Mr. THOMAS: We offer in evidence the entry on the 4th line from the top of page 547, with the heading Tuesday May 27th, 1884, page 547 of Exhibit # 1.
Received and read in evidence without objection, as follows,—(Ex. No. 1005.)

Tuesday, May 27/84 547.
46 B/R 5629 A Mosher, $8174.70."

360 Q. You may state if that item just referred to was carried on, and posted into the Ledger of the Marsh National Bank, and charged up to the Bills Receivable account?

A. It was carried to, and entered into the Ledger account of Bills Receivable. Ledger No. 1 of Marsh National Bank.

Q. On the debit side of that Ledger?

A. Yes sir.

Q. You may state what was the effect of that entry?

A. It indicated that a note for that amount had been placed among the Bills Receivable of the bank on that day, you will find it in the 28th line from the top of the page, in the left hand column.

Mr. THOMAS: We offer in evidence the top of page 46 of Exhibit No. 10, with the date line, also the entry appearing on line 28 from the top, left hand side of the page.

Entry offered is received and read in evidence as follows: (Exhibit No. 1006).

46	Bills Receivable Account. 1884.	
May 27th,	$547	$8174.70

Q. Referring again to Bills Receivable of Donnell Lawson & Simpson taken into the bank after May 1884, I will ask you
361 to state when it is you find the first note of that description entered into the assets of the bank?

A. Journal 9 of the Capital National Bank, Exhibit No. 2, page 231 under date of Monday October 14th, 1884, the first and second lines from the top of the page.

Q. You may state what items appear there?

A. B/R. Two notes of Donnell, Lawson & Simpson.

Mr. THOMAS: We offer in evidence the following portion of page 231 of Exhibit No. 2, being Journal "A" of the Capital Na-
362 tional Bank, also the head of the page "Tuesday October 14th, 1884, and the entries appearing on the first and second lines from the top.

The entry offered is received and read in evidence being as follows:

(EXHIBIT No. 1007.)

TUESDAY, *October* 14, 1884. 231.

33 B/R 6841	A. Donnell Lawson & S.	.....	5048.76
" " 6842 ".	"	.....	4695.79."

Q. I will ask you to state if these items and entries were posted and transferred to the Ledger of the Capital National Bank?

Mr. DEWEESE: Are they a charge or a credit?

A. They are a charge to Bills Receivable Yes sir they were entered in to the ledger account of Bills Receivable on ledger "A" of the Capital National Bank at page 33, on the left hand side at lines 24 and 25 from the top.

Q. Is that the book identified by the Notary Mr. Ricketts, and by the court reporter as Exhibit No. 11?

A. Yes sir.

363 Mr. THOMAS: We offer in evidence the entries appearing on lines 24 and 25 in the left half of page 33 of Exhibit No. 11, being the Ledger "A" of the Capital National Bank, also the top of the page, the page number and the date.

Entry offered is received and read in evidence, as follows, being Exhibit No. 1008.

Bills Receivable. 33.

Oct. 14th,	231	5084.76
"	"	4695.79"

Q. You may state what those entries indicate and what is their effect?

364 A. They are a charge to the Bills Receivable account, and indicate that notes for those amounts were placed among the Bills Receivable of the bank on that day.

Q. I will ask you if you find notes of the firm of Donnell, Lawson & Simpson taken into the bank, the Capital National Bank on July 20th, 1885?

A. July 20th, 1885 in Journal 9, Capital National Bank, page 705, on the 7th line from the top of the page.

Mr. THOMAS: We offer in evidence the entry appearing on the 7th line from the top of page 705, of this Journal also the top of the page, and the entry thereon.

365 The entry offered is received and read in evidence, as follows, being numbered Exhibit 1009.

MONDAY, *July* 20, '85. 705.

77 B/R. 9133 @ D. L. & Simpson..... 9391.57

Q. You may state Mr. Whitemore what is indicated by the letters "B-R" that appear on this page of the Journal, if you know.

A. They are used as an abbreviation for Bills Receivable.

366 Q. You may state if those items just referred to are transferred or posted to the Ledger of the Capital National Bank?

A. It was.

Q. To what book and page?

A. Ledger "A" Capital National Bank, page 77.

Q. In the account of Bills Receivable?

A. In the account of Bills Receivable, in the upper half of the space between the 5th and 6th lines from the bottom of the left hand side of the page.

Mr. THOMAS: We now offer in evidence the entry just referred to by the witness reading as follows,—also the writing on the top of the page as follows,—"Bills Receivable," page 77.

Received and read in evidence as follows; (Ex. 1010)

77

Bills Receivable.

1885.		
July 20.	705	9391.57.

Q. Now you may state what that entry indicates, and what is its effect upon the bank?

367 A. It indicates a charge to Bills Receivable of that amount and shows that a note of that amount was placed among the Bills Receivable of the bank on that day.

Q. I will ask you to state if you have examined to ascertain if a note of Donnell, Lawson & Simpsons was taken by this bank on July 24th 1885?

A. Yes sir, Journal "A" Capital National Bank, page 713, the 5th line from the top of the page.

Mr. THOMAS: We offer in evidence the entry appearing on line just referred to by the witness, also the writing at the top of the page, "Friday July 24th, 1885."

368 The entry offered is received and read in evidence as follows, being marked Exhibit No. 1011.

FRIDAY, *July 24th*, 1885. 713.

78 B/R 9157 @ Donnell L. & S..... 9391.56"

Q. You may state Mr. Whitmore if you find that this entry has been transferred or posted to a ledger of the Capital National Bank, and if so where.

A. Yes sir, on ledger "A" of the Capital National Bank, Bills Receivable account, page 78, the 21st line from the top of the page in the left hand column.

Mr. THOMAS: We offer in evidence the entry contained on the line indicated by the witness, also the writing contained on the top of the page, and the entry.

369 The entry offered is received and read in evidence as follows, being marked Exhibit No. 1012.—

78. Bills Receivable.

1885.		
July 24.	713	9391.56

Q. You may state what that entry indicates, and what its effect is, and what transaction it reflects.

A. It shows a charge to Bills Receivable in that amount, and indicates that a note of that amount was placed among the Bills Receivable of the bank on that day.

Q. You may state if you find a note of Donnell, Lawson & Simpson was taken into the Capital National Bank on August 13th, 1885.

370 A. I find two notes taken.

Q. Where do the entries indicating that appear?

A. The first entry appears on the 9th line from the bottom of page 745, Journal A of the Capital National Bank.

Q. And the other one appears?

A. The second appears on the 8th line from the bottom of the same page.

Mr. THOMAS: We offer in evidence the entries appearing on the 8th and 9th lines from the bottom of the page referred to by the

witness, also the writing appearing on the top of the page as follows:—"Friday August 13th, 1885.

The entry offered is received and read in evidence being as follows, and marked exhibit No. 1013.

"FRIDAY, *August* 13", 1885. 745.

81 B/R 9356 @ Donnell, L. & S..... 10200.
" 7 " do. ..... 20300.00"

Q. You may state if those entries just referred to have been transferred to the ledger of the Capital National Bank, and if so to what book and page.

371 A. They have been posted to the account of Bills Receivable, Ledger 9, Capital National Bank, page 81 between the 23rd and 24th lines from the top, both appearing in the space on the left hand side of that page.

Mr. THOMAS: We offer in evidence the entries just referred to by the witness also the following appearing on the top of this page,—"Bills Receivable."

The entry offered is received and read in evidence as follows,—being marked Exhibit No. 1014.—

1885.	Bills Receivable.	81.
Aug. 13,	745	10200.00
"	"	20300.00

Q. You may state what transaction these entries indicate or reflect?

A. They show a charge to Bills Receivable of these amounts, and that notes for these amounts were placed among the Bills Receivable of the bank on that day.

* * * * * * *

372 Q. Calling your attention to the first books of the Marsh National Bank I will ask you to state if you have examined the Journal and Ledger so that you are able to state how those books were opened?

A. I have.

Q. You may state in a general way how that was done, what entries were made.

373 A. The balances as shown by the ledger of Marsh Bros. Mosher & Co., were transferred to the new ledger opened for the Marsh National Bank.

Q. Was a new set of books opened up in the same manner as would be done if a new bank were organized?

A. No sir.

Q. In what way did it differ?

Q. In the ledger, the first ledger of the Marsh National Bank, wherein the different accounts are opened up, you may state

374 if you have examined the Journal of the Marsh National Bank of the corresponding date to ascertain whether this

journal contains entries which open up the ledger of the Marsh National Bank?

A. No sir, It does not contain entries opening up the books of the Marsh National Bank.

Q. What are the first entries that appear on the journal of the Marsh National Bank, I mean in a general way?

A. In a general way they are a continuation of the business of Marsh Bros. Mosher & Co.

Q. And do they contain anything else other than the current business of that day?

375 A. No sir.

* * * * * * *

Q. Now I will ask you if you have examined the account transferred from the ledger of Marsh Bros. Mosher & Co., to the Marsh National Bank known as "Collection account?"

A. Yes sir.

Q. Was such an account transferred from the ledger of Marsh Bros. Mosher & Co., to the ledger of the Marsh National Bank, at the commencement of business of the Marsh National Bank?

376–378 A. Yes sir.

* * * * * * *

379 Mr. THOMAS: We also offer in evidence the top of the page, of page 617 of Exhibit No. 10, and the entry on the first line on the left half of the page.

The entry offered is received and read in evidence as follows, the same being marked Exhibit No. 1016.

	Collection %, Marsh Bros. Mosher & Co.		617.
1883.			
July 2nd.	Balance,—	488.	14573.32.

Q. Does the entry just introduced in evidence appearing on the top of page 617 as follows "July 2nd, Balance 488, $14573.32 appear in red ink?

A. It does.

Q. You may state what is indicated by this entry appearing as it does on this ledger of the Marsh National Bank.

A. It indicated that the Marsh National Bank considered that they had an asset of 14,573.32 in Collection Account, but the account being in red ink would indicate that it was overdrawn and that they had paid out more to that amount than they had received in that account.

* * * * * * *

380 & 381 Q. Can a coll-ction Account if properly kept, be overdrawn?

A. No sir, it cannot.

* * * * * * *

382 A. The balance of the Omaha National Bank for July 2nd, 1883 is $10,000.00 more than the balance, that is

$10,000.00 more on the General Balance book than is shown on the ledger account of the Omaha National Bank for the same date,—
that is, this General Balance book shows $10,000.00 more
383 due from the Omaha National Bank than the ledger shows due from the Omaha National Bank.

Q. In other words you mean to state that the collection account by erasure is made $10,000.00 less, and the Omaha National Bank account by erasure and change of figure is made $10,000. greater, thereby maintaining the balance of the books?

A. No sir.

Q. What do you mean?

384 A. I mean that by erasure of the figure "1" $10,000.00 was taken from the balance in the Collection account on the General Balance book and by the addition of the fig. "1" the balance on the General Balance Book due from the Omaha National Bank was increased $10,000.00.

Q. I will ask you to examine the Journal of the bank,——

COURT: Were they both upon the same side of the Ledger?

A. Yes sir.

Q. I will ask you to examine the Journal of this corresponding dates, and will ask you to state if there are any entries upon the Journal to justify or authorize these changes in amounts as they appear upon the balance book?

A. No, there are none.

* * * * * * *

385 Q. I will ask you to state Mr. Whitmore if prior to December 14th 1885 there was carried on the books of the
386 Capital National Bank as an asset, an account known as Bills of Exchange?

A. Yes there was prior to December 1885, and in December 1885 there was an account in the Capital National Bank known as "Bills of Exchange Account."

Q. Upon that date, that is December 14th, 1885, you may state if you find a credit to that account amounting to the sum of $29,968.00.

A. I find no credit for that amount.

Q. What do you find?

A. I find a debit to the account of that amount.

Q. That is a charge to that account?

A. Yes sir.

Q. Where does that appear on the Journal of the Capital National Bank, Exhibit No. 3?

A. It appears on Journal B of the Capital National Bank, page 205, on the 21st line from the bottom of the page.

Mr. THOMAS: We offer in evidence the entries appearing on the 20th and 21st lines from the bottom of the page referred to by the witness, also the entry at the top of the page, as follows.

387 The entry offered is received and read in evidence as follows,—being marked Exhibit 1017,—

"Monday Dec. 14/85. 205.

123 Bills of Exchange..... 29968.00
123 ..... 6722.20 36690.20

Q. Were those items posted to the ledger of the Capital National Bank, and if so to what book and page?

A. Ledger "A" of the Capital National Bank, page 123, account Bills of Exchange, on the 3rd line from the top of the page, in the left hand side of the page.

Mr. THOMAS: We offer in evidence the entry contained on the line just indicated by the witness, marked Exhibit 1018, also the heading at the top of the page.

388 The entry offered is received and read in evidence as follows,—

1885.	Bills of Exchange.	123.
Dec. 14.	205	36690.20

Q. You may state what that entry indicates, what sort of a transaction?

A. It indicates that a total of that amount was added to the Bills of Exchange account on that day.

Q. Now you may state Mr. Whitmore, if upon that same day, to-wit, December 14th, 1885 Bills Receivable, or notes of the Marshes were taken out of the bank, as disclosed by the books of the bank, and if so, how much?

389 A. The journal shows that notes indicated by numbers and the word "Marsh," were apparently paid on that day.

Q. I will ask you where that appears on the journal if anywhere?

A. Commencing on the 7th line from the top of page 204, of Journal B of the Capital National Bank, under date of Monday December 14th 1885, and continuing for 9 lines or entries

390 Mr. THOMAS: We now offer in evidence the entries appearing on lines No. 7-8-9-10-11-12-13-14 and 15 beginning at the top of the page, page 204 of Journal B of the Capital National Bank, identified as exhibit No. 3, also that portion at the top of the page, Monday December 14/85.

The entries offered received and read in evidence as follows,—being numbered Exhibit No. 1019.—

204	Monday Dec. 14/85.	
108, B/R	10418 @ Marsh	4868.00
	10461 " "	5000.00
	10475 " "	2500.00
	10502 " "	2500.00
	10511 " "	5000.00
	10519 " "	3600.00
	10525 " "	2000.00
	10527 " "	2000.00
	10529 " "	2500.00

391 Q. I will ask you Mr. Whitmore what is indicated by the numbers which appear in these entries commencing at No. 10418 and appearing further on down?

A. The numbers of the notes on the Discount Register of the Capital National Bank.

Q. What is the total footing of those notes, which have been introduced in evidence, as shown by the entries just offered.

Q. What is the total amount of the footing of the items just introduced in evidence, under the heading of Bills Receivable "Marsh"?

392–399 A. $29,968.

Q. Mr. Whitmore is that the same amount as the item that is charged to Bills of Exchange on this same day?

A. Yes sir, the same amount as one of the items charged to Bills of Exchange on this day.

Q. You may state what this entry making a charge against Bills of Exchange, and Credit to Bills Receivable of the same amount, on account of these Marsh notes, indicates?

A. I will have to answer that question as two questions. The entries showing payment of these notes called Marsh notes show that the Bills Receivable of the bank were reduced $29,968.00 on that day. The charge of $29,968.00 to the Bills of Exchange account shows that the Bills of Exchange account was increased that day that amount, and that there was due the bank from that account $29,968.00 more than had been the previous day we will say, if there had been no credit to the account.

COURT: Have you made examination to see if the records indicate that these notes were paid in money or renewed on that day or at that time?

A. The Journal does not indicate that any renewal notes were taken on that day for those notes.

* * * * * * *

400 Q. Now Mr. Whitmore I will ask you to examine the journal of the Capital National Bank under date of July 20th, 1886, and state if you find any entries upon that book indicating that Bills Receivable were taken into the bank on that day.

A. I do

* * * * * * *

401 Q. Have you made an investigation and are you able to state the items of Bills Receivable that comprised this total of $46,836.56?

A. I haven't been able to determine exactly the notes that make up that $46,836.00 but I have made it within a few dollars.

Q. You may state if you have found, notes or Bills Receivable that went into the bank that day that aggregated within a few dollars of the sum of $46,836.56.

402 & 403 A. Yes sir.

* * * * * * *

404 Q. Now you say you have been able to find from the Discount Register referred to what notes comprised those items of $46,836.56?

A. Yes sir, I have.

Q. Have you prepared a schedule giving each note and the amount thereof, as shown by the Discount Register of the bank?

A. Yes sir.

Q. Handing you Exhibit No. 1020 you may state if that is the schedule to which you refer?

A. It is.

* * * * * * *

405 Q. Does that schedule and the amount referred to include a note purported to have been executed by F. S. Johnson & Co., being for the sum of $9968.00?

A. It does.

Q. Does it include a note for the sum of $10,000.00 purporting to have been signed by the First National Bank of Hastings?

A. It does.

Q. Does it include a note for the sum of $10,000.00 purporting to have been signed by the First National Bank of Kearney?

406–431 A. It does.

* * * * * * *

432 Q. I will ask you Mr. Whitmore if in the ledger which has been referred to as the ledger of Marsh Bros. Mosher & Co., there was an account known as Stock & Bond account?

A. Yes sir, there was such an account.

Q. On page 639 of the ledger referred to?

A. Page 639 of ledger 1, Marsh Bros. Mosher & Co.

Q. What is the total amount of Stocks & Bonds shown on hand by the Ledger of Marsh Bros. Mosher & Co.?

433 A. $30,540.

Q. When this account of Stocks & Bonds appears on the ledger of the Marsh National Bank, for what amount is the balance carried over?

A. Carried over as $540.00.

Q. I will ask you to state Mr. Whitmore upon an examination of the books of Marsh Bros. Mosher & Co., and the opening of the books of the Marsh National Bank, what you find with reference to the transferring of the account of Stocks & Bonds and for Bills Receivable, state fully to the jury.

434 A. I find that the Stocks & Bonds account of Marsh Bros. & Mosher & Co., was $30,540.00 and that it appears on the books of the Marsh National Bank as $540.00, and the books of the Marsh National Bank show that there have been erasures of two figures in the account, which would reduce it from something in the tens of thousands down to $540.00.

I find that Bills Receivable of Marsh Bros. Mosher & Co., of $248,029.33, that appear on the books of the Marsh National as $278,029.33, a difference of $30,000.00. And that there appears to have been an erasure in the figures to make this amount, the "4" having been erased and a "7" substituted.

435 Q. I believe you stated in your testimony yesterday that there are no entries in the commencement of the journal of

the Marsh National Bank which carried the balances on the Marsh National Bank ledger, but that they are transferred directly from the ledger of Marsh Bros. Mosher & Co., to the Marsh National Bank, is that correct?

A. Yes sir.

Q. Handing you Exhibit No. 18, you may state what that book is.

A. General Balance Book of the Marsh National Bank.

Q. Is that the same book concerning which you testified yesterday.

A. Yes sir.

Q. You may state if you can tell from that book if there have been any erasures in the figures opposite the account of Stocks & Bonds, and in the account opposite the letters "B/R" which indicat- Bills Receivable.

436 A. Yes sir, there are.

Q. For how many days do these changes appear?

A. They continue for every business day from the 2nd of July 1883 to and including the 27th day of July 1883.

Q. I will ask you if you can tell from any of the erasures what the figures were before they were erased.

A. On the Stocks & Bonds account, Tuesday July 24th, 1883, the figure "3" appears to have been partially erased,, changing it from $30,000.00 to——

Q. How much difference does it make in that account?

A. It makes a difference of $30,000.00.

Q. What change has been made in the Bills Receivable account?

437 A. Changes in the figures from Monday July 2nd, 1883 to and including July 27th, 1883.

Q. How have those changes affected that account?

A. It makes a difference of $30,000.00, increased the Bills Receivable by that amount.

Q. You may state from your knowledge as a bookkeeper and an accountant, when in your opinion these changes were

438–441 made.

A. They were made on or about the 27th day of July 1883.

Mr. DEWEESE: That would be indicated by the fact that the changes when they commenced continued up to that date, upon the different entries, that apparently had been made?

A. Yes sir.

Mr. DEWEESE: The result simply was to cut out the $30,000.00 for the time it had been entered in those new books?

A. Yes sir.

Q. What was the effect upon the account of Stocks & Bonds, as indicated by the books of the Marsh National Bank?

A. It reduced the amount of stocks and bonds held by the bank, and increased the Bills Receivable apparently held by the bank.

Mr. DEWEESE: In the same amount?

A. Yes sir, in the same amount.

* * * * * * *

442 Q. Could an entry or a transaction be properly put on the ledger, that did not appear on the Cash Journal for the corresponding date?

A. There should be some record of it upon the Journal for that day.

Q. Now I will ask you to examine the Cash Journal of the Marsh National Bank for the month of July 1883, and state if there are any entries on that Journal during the month that would authorize or justify the increase of the Bills Receivable account as shown by the General Balance book and the ledger from 248029.33 to 278029.33, to *to* authorize the changes in that Bills Receivable account from the dates July 2nd to July 27th inclusive in the sum of $30,000.00.

A. I haven't look- up that matter, and if you want to go on with something else, I can look it up later when court is adjourned.

Q. I will ask you to state if from your examination of the books and from your knowledge as an expert accountant, whether in your opinion the increase of the Bills Receivable account in this amount of $30,000.00 was a genuine transaction of the bank, if such Bills Receivable actually went into the bank as shown by its books.

443 A. I should say that no Bills Receivable for the amount of $30,000.00 went into the bank on that day on the 2nd of July.

* * * * * * *

444 Q. I will ask you if you have examined the books of Marsh Bros. Mosher & Co., referring to their ledger, and can state what it*mes* comprised this $30,000.00 stocks & Bonds which appeared as the balance on the ledger of the Marsh Bros. Mosher & Co., at the time it was transformed into the Marsh National Bank.

A. I can as to $30,000.00 of the items, I think.

Q. Have you examined that book to ascertain what items comprised this $30,000.00 of the Stocks & Bonds account, prior to the time that account was transferred to the ledger of the Marsh National Bank, and as it was at that time transferred?

A. First I want to modify the amount in the preceding answer, I think I said $30,000.00, it should be $22,500.00.

Q. Have you examined that book to ascertain what items comprised this $30,000.00 of the Stocks & Bonds account, prior to the time that account was transferred to the ledger of the Marsh National Bank, and as it was at that time transferred to that bank?

445 A. Yes sir.

Q. When did those items enter upon the books and become a part of the assets of the firm of Marsh Bros. Mosher & Co.

A. January 6th, 1882—$7500. April 1st, 1882, $7500. July 24th, 1882—$7500.00 and December 29th, 1882, $7500.00.

Q. The four comprising $30,000.00?

A. Yes sir.

Q. Now you may state what those items consist of, what they are.

A. As to the first I am unable to determine from the books. As

to the items of April 21st, 1882, that is derived from a credit to the account of Marsh Binder Manufacturing Company and as to the amount of July 24th, 1882 that is derived from the account of the Marsh Harvester Company, this account is Cr. As to the item of December 29th, 1882 $7500.00 that is derived from a credit to the account of the Marsh Harvester Company.

Q. Is there anything on the books to indicate where that first item of $7500.00 came from?

A. No sir, nothing that I can find.

Q. What book of Marsh Bros. and Mosher did you have access to to determine the three that you have testified to?

A. Ledger No. 1 of Marsh Bros. Mosher & Co.

—. Have you the Journal of Marsh Bros., Mosher & Co., that was kept during the life of that ledger?

446–452 A. No, I think that is not here.

Q. Have you ever found it?

A. We never have been able to, at least I have never seen that Journal.

Q. Have you made search for it among the books of the Capital National Bank, while they were in the hands of the Receiver Mr. McDowell for this particular journal?

A. Yes sir.

Q. And have been unable to find it?

A. Yes sir.

COURT: And that is the reason you couldn't state what that first $7500.00 is?

A. One might find it if he had that Journal.

Q. You couldn't determine that because you couldn't find that book, you don't know whether that would disclose it or not?

A. I couldn't determine it from the books I have here to my own satisfaction.

* * * * * * *

453 Q. Now what was done with the expense account, such as "wages paid" "taxes" and interest paid, how were those treated in closing up at the dividend period?

A. Well the same practice was followed with reference to the balances in these several accounts. They were credited, the balance in a particular account, and charged it to undivided profits.

Q. In other words in closing, or charging out, for instance the item of "interest paid" they would credit that account with the amount of it at that date, and charge that amount against the undivided profits?

A. No they did not do that in every case.

Q. I mean is that the proper way in which it should be done.

454–456 A. Ordinarily that is the way it should be done.

Q. Was that done with reference to the account of "wages" or salaries?

A. Yes sir, in most cases it was done.

Q. Now referring to the account known as "interest paid" you

stated that in all instances when that account was closed out, the amount of it wasn't always charged to the undivided profit account, is that correct?

A. The credits to interest paid were not always charged to the undivided profit account.

Q. In what instances was that not done?

A. Well in numerous instances, I have a list of them here.

Q. You may state giving the date and the amount of credits made to the "interest paid" account, that were not charged to the undivided profit account.

* * * * * * *

457 Q. What is the total of these credits to the "interest paid" account, that were not charged to the undivided profit account?

458 A. The total of the amounts I have given is $115,916.44.

Q. Now you may state Mr. Whitmore what was the effect of those entries on the condition of the bank as shown by its books.

A. They reduced the amount of the expenses of the bank.

Q. You mean to state that they reduced the amount of the expenses, or reduced the apparent amount of the expenses?

A. Well they reduced the amount that had been expended in payment of interest.

Q. Could, or can a credit entry to the "interest paid" account be properly made, that is not charged against the undivided profit account?

459 A. Well if by undivided profit account you mean the earnings of the bank, it could not be.

* * * * * * *

Q. Would it decrease the apparent expenses of the bank, and consequently increase the apparent profits of the bank so as to leave and apparent net profit upon which a dividend might be declared?

460 & 461 A. It would when they come to make up a statement of the expenses and earnings of the bank for a given period say for a half year or a year. If they have merely put in the balance remaining in the interest paid account, why of course they wouldn't show a truth, it wouldn't be a true statement of the interest they had paid during the period.

Q. It would understate the true amount of interest actually paid to the extent of the amount of this credit which wasn't charged against the undivided profits.

A. Yes sir.

* * * * * * *

462 Q. You have made an examination of the books, and from them prepared a schedule showing the amounts of dividends paid by the Capital National Bank since that time, and the amount credited to surplus?

A. I have.

Q. Now I will ask you to state, if you know, the amounts of

dividends declared and paid by the Capital National Bank, and also credited to surplus account from January 1st, 1885 to the time of its failure giving the book and page where those amounts may be found and verified.

A. I have no schedule giving the book and page of the dividends, but I have a schedule showing the several amounts paid, and the time of their payments, but as to the book and page they kept no dividend account, so there is no book and page. It is to be arrived at from the record of the proceedings of the directors' meetings, and from the charges to the undivided profit account.

Q. On the Journal?

A. On the Journal and ledger.

Q. Have you a schedule showing the page of the journal or ledger with reference particularly,——

A. I have the ledger account of undivided profits, showing the charges of the dividends to the account. I can give the ledger and page from that of each one of these, of the surplus also.

Q. You may answer the question then as propounded.

463 A. Dividends January 12th, 1885, Ledger A, page 798, these ledger pages refer to the "Undivided profit" account.

15000.

that is the total dividend, there are two amounts making a total of $15,000.00.

July	3, 85	Ledger	A,	Page 798.....	13000.
Dec.	31 85	Ledger	"A"	Page 798.....	16000.
June	30 86	Ledger	A	Page 798.....	14000.
Dec.	31 86	Ledger	B	Page 25.....	18000.
July	1 87	Ledger	B	Page 25.....	18000.
Jan.	3 88	Ledger	C	Page 465.....	18000.
July	11 88	Ledger	C	Page 465.....	18000.
Jan.	9 89	Ledger	7	Page 435.....	18000.
July	10 89	Ledger	C	Page 465.....	18000.

That date may be on one book July 11th, and on another book it may be July 10. There is a difference in the date and I have forgotten which book the difference appears in,—I think the ledger gives a different date.

The next is—

464

Jan.	15 90	Ledger	7	Page 435.....	15000.
July	9 90	Ledger	7	Page 435.....	15000.
Jan.	15 91	Ledger	8	Page 555.....	15000.
July	1 91	Ledger	8	Page 555.....	250.
July	9 91	Ledger	8	Page 555.....	1000.
July	17 91	Ledger	8	Page 555.....	13750.

Making a total of $15000., the dividend declared by the record book was $15,000.00 but it seems to have been paid at three different times, and it is charged off on three different dates, and charged to the undivided profit account.

Jan. 13 92 Ledger 9 Page 631 ..... 15000.
July 14 92 Ledger 9 Page 631 ..... 12000.

Total dividends $253,000.00

Q. Does that include the surplus?
A. No sir.

* * * * * * *

465 (By Mr. THOMAS:)

Q. Now you may state Mr. Whitmore if you have examined some of the certificates of deposit which were issued by the Capital National Bank while it was doing business, and have compared them with the books and records of the bank?

A. I have.

Q. I will ask you if you have among others examined certificates of deposit attached to the depositions read in evidence, and identified as Exhibits No. from 109 to 146 inclusive, identified by the Notary Mr. Rickstts as such and attached to the depositions of McDonald, Outcalt, Hale and others?

A. I haven't examined those, you will have to let me have the certificates of deposit because I haven't had an opportunity to examine the numbers.

466 (Counsel passes depositions and exhibits to Witness.)

Q. Have you since your last answer examined the certificates so as to verify the numbers on them, with the written statement you have before you?

A. Yes sir, I have examined the certificates attached to that deposition, and have checked them off on the list I have before me, of certificates which I have examined and compared with the record.

Q. I will ask you if you have examined certificate of the Capital National Bank numbered 21379?

A. Yes sir.

Q. You may state for what amount the original certificate purports to have been issued for.

A. The stub amount & the certificate amount are for $50,000.00.

Q. You may state if the Capital National Bank kept a book upon which it registered the certificates of deposit, that were issued by the bank.

A. It did.

Q. What was that book known as?

A. Certificate of Deposit Register.

Q. Did you compare the certificate to which you now refer, or may hereafter refer to the entry of the same certificate upon the Certificate Register?

A. Yes sir.

Q. Now you may state for what amount this certificate No. 21379 for $50,000.00 was carried on the Certificate Register.

467 A. $100.00.

Q. Are Exhibits No. 33 and 34 which I now hand you

the Certificate of Deposit register to which you have testified, of the Capital National Bank?

A. Yes sir.

Q. Now you may state to the jury in a general way what that book contained, and how it was kept.

A. It gives the date of the deposit, the name of the depositor, the number of the Certificate, the amount of the Certificate, the total amount for the day, and the date when the Certificate was paid, and the person to whom the Certificate was payable. That is where such entries were made,—There is a column for that, and shows the consecutive number of the certificate for convenience in finding the certificate and identifying it with the stub.

Q. Does each certificate of deposit issued by the bank bear a number, and are the numbers consecutive?

A. The numbers are consecutive in each stub book, whether the numbers were consecutive all through the Register, I don't know because one register is gone.

Q. The numbers in the Registers which you have been able to find are consecutive?

A. I think the numbers are consecutive.

Q. Does each certificate of deposit contain a printed number, and does that number correspond with the printed number on the stub, the book from which the certificate of deposit is taken?

A. Yes sir.

468 Q. That is the certificate of deposit is originally in a book, Exhibit No. 926 which I now hand you?

A. The certificates were printed in blank on a certain form, and they were so manufactured that the certificate itself could be torn out of the book, and a stub remain, similar to the stubs in a check book, and the certificate and the stub were each made with a printed number, the numbers being the same on the certificate and on the stub.

Q. Then a certificate of a certain number has been detached from the stub of the corresponding number?

A. Yes sir.

Q. And the stub of that number indicates a description of the certificate that was issued and detached from that particular stub.

A. Yes sir.

Q. And what information does the stub give?

A. It gives the amount of the certificate, and the date it bore, and the person to whose order it is payable, and the number, and there were blanks for other information, such as the name of the applicant, and the rate of interest, a sub-stub for the rate of interest which was to go with the certificate, if the certificate was an interest bearing certificate then a little more of the stub was torn off than if the certificate did not draw interest. By an examination of some of the certificates in that deposition you will find that some of them are longer than others, owing to their bearing interest. And when it issued it was entered upon the Certificate Register under the number that the certificate bore.

Q. This certificate No. 21397 issued to J. E. Hill Tr., to which

you have just testified, you say this was entered upon the certificate register as what amount?

469 A. It appears upon the register as $100.00.

Q. That is, the certificate appears upon the register as having been issued for $100.00?

A. Yes sir.

Q. When in fact it was issued for $50,000.00.

A. The certificate itself shows it was issued for $50,000.00.

Q. Does that certificate show that it was presented to the bank and paid by the bank?

470 A. It bears a stamp, a "paid" stamp of the Capital National Bank, January 6", 1893 apparently.

Q. Can you tell from the certificate how much the bank paid when that was cancelled?

A. No sir.

Q. Have you examined the books of the bank to ascertain what amount the bank paid out on that certificate at the time it was presented to the bank and cancelled?

A. I think I can.

Q. You may state.

A. The ledger of that bank on January 6th 1893 shows that a certificate for $50,000.00 was paid on this day, but the number of the certificate is not given on the Ledger. Further than that I could not identify this particular certificate as being the one which was paid on that day, the ledger merely shows a certificate for $50,000.00 was paid on that day.

COURT: Do they come from the Journal, the entry of these?

A. The amount of certificates paid on each day was included in the total checks for the day. The certificate account was kept on the Deposit Ledger, Depositor's Balance Book No. 2, and the total of Certificates was included in the total of checks, and then that total went onto the Journal, and it is only by making a footing of the checks for the day, and seeing if that amount agrees with the amount on the Journal that you can tell, presumably it did.

Q. Have you been able to find any other certificates of deposit of that amount that was paid on that day?

A. Well I have made no search for another certificate of $50,000.00 which had been issued by the bank and paid on that day.

Q. I will ask you if the certificate of deposit register in-

471 dicates that that certificate is paid.

A. Yes sir.

Q. Upon what day does that show it was paid?

A. 4/24/91.

Q. What does that mean?

A. April 24th, 1891.

Q. In other words the Certificate of Deposit Register shows this certificate paid April 24th, 1891, whereas the certificate itself bears the "Paid" stamp of the bank dated January 6th, 1893, and the

ledger shows $50,000.00 paid on account of Certificate of Deposit that day.

A. Yes sir.

Q. Certificate No. 23593, have you compared that certificate in the same manner as the former one you have just testified to?

A. Yes sir.

Q. What is the date of that certificate? As shown by the Certificate itself?

A. December 9th, 1890.

Q. For what amount does it purport to have been issued, as shown by the certificate?

A. $10,000.00 to J. E. Hill, State Treasurer. It was registered December 9" 1890, the name is blank on the Register. The letters "Do" being written in in ink. The amount is $100.00 and the date paid by the Register is April 24", 1891.

Q. Does the original certificate indicate that it was paid, and if so on what date?

A. It has the paid stamp of the Capital National Bank, November 3rd 1892.

Q. Have you examined the books of the bank to ascertain what amount was paid on that certificate at that time?

A. Yes sir.

Q. You may state what amount was so paid.

472 A. The ledger account shows that a certificate of $10,000.00 was paid on November 3rd, 1892.

Q. What is the next number?

A. 24471.

Q. Have you examined the Certificate No. 24471, and compared it with the books as testified to with regard to the former certificates?

A. Yes sir.

Q. What is the date of that certificate?

A. The certificate is dated April 28th, 1891.

Q. Issued to whom?

A. Issued to D. B. Welch, for $10,000.00.

Q. And to whom does the stub indicate it was issued?

A. The stub indicates "issued on account of costs."

Q. And for what amount?

A. $1.50, the Register amount. The regular order of the certificate has been changed by ink numbering. It would appear that they made a mistake in registering their certificates, and that the space on the Register for 471 was taken by 472, so that 471 does not appear at all until May 1st, under date of May 1st. And it then shows the name, and deposited by "costs" and the amount is $1.50.

Q. Does the original certificate indicate that it was presented to the bank and paid and stamped?

A. Yes sir, it was paid November 28th, 1891.

Q. You may state what amount the books show was paid for that certificate.

A. The ledger shows that a certificate for $10,000.00 was paid on this date, November 28th, 1891, and the Register shows that this certificate was paid May 13th, 1891.

Q. What is the next number?

473 A. The next is 24653.

Q. Have you examined Certificate No. 24653, and compared it with the various books of the bank, of which you have just testified?

A. Yes sir.

Q. You may state the date of that certificate, and to whom issued.

A. Stub date June 1st, 1891. Certificate date June 1st, 1891. Name on Stub, C. Hammond. Name on Certificate C Hammond. Stub amount $5,000.00. Certificate amount $5,000.00.

Q. What amount is shown on the register?

A. Register amount $100.00.

Q. Does this certificate indicate that it was presented at the bank, cancelled and paid?

A. Stamped "Paid June 20th, 1892."

Q. For what amount do the books of the bank show it was paid on that day?

A. The ledger shows a certificate for $5000.00 was paid on that day, and the Register does not show that the certificate was paid.

Q. What is the next number?

A. #24707.

Q. Have you examined Certificate No. 24707 and compared it with the books of the bank as you have testified heretofore?

A. I would suggest that I could shorten this a great deal.

Q. If you have examined any other certificates and compared them with the books of the bank as to the amount on the Register, and the date, and when paid, and the amount and so forth, you may state what the result of your comparisons and investigation is and give the dates, amounts, and other items as you have in your former answers.

474 A. #24707 Stub date shows June 10, 1891. Certificate date June 10, 1891. Name on stub John A. T. Hilds, Certificate name John A. T. Hibbs. Stub amount $3,000.00. Certificate amount $3,000.00. Register amount $300.00. Dated paid on Register June 11th, 1891. Date paid in Certificate July 8th, 1892. Date paid on Ledger July 8th, 1892.

Q. What amount was paid on that date?

A. $3000.00.

The next is #24806. Stub date June 27th, 1891. Certificate date June 27th, 1891, name on Stub Cassius S. Weese. Certificate name Cassius S. Weese. Stub amount $2,100.00. Certificate amount $2,100.00. Register amount $100. Ledger amount paid $2100.00. No date paid on Register. Date paid on Certificate June 27th, 1892. Date paid on Register June 27th, 1892. The name on register was the same as the certificate.

The next is #24866. Stub date July 8th, 1891. Certificate Date July 8th, 1891. Name on Stub A. Humphrey. Certificate name Austin Humphrey. Stub amount $4500.00. Certificate amount $4500.00. The Register amount is $500.00. Ledger amount paid $4500.00. Date paid on Ledger October 13th, 1891. Same on certificate, October 13th, 1891.

No. 24937.

Stub date July 18th, 1891. Certificate date July 18th, 1891. Name on Stub J. E. Hill, Treas. Certificate name J. E. Hill, Treas. Stub amount $14650.00. Certificate amount $14650.00. Register
475 amount $4650.00. Amount paid on Ledger $14650.00. Date paid on Register August 6th, 1891. Date paid on Certificate August 6th, 1891. Same on Ledger. Name on Register "Collections." That one wasn't signed by Mosher or any one for the bank apparently.

The next is No. 24911.

Stub date July 20th, 1891. Certificate date July 20, 1891. Name on Stub, J. E. Hill, State Treas. Certificate name, J. E. Hill, State Treas. Stub amount $10,000.00. Certificate amount $10,000.00. Register amount $5,000.00. Ledger amount paid $10,000.00. Date paid on Register August 6th, 1891. Same on certificate and Ledger, and the name on the register is deposited by "do," being immediately under the word "collections" written on the line above.

No. 24981.

Stub date July 27th, 1891. Certificate date July 27th, 1891. Name on stub A. P. S. Stuart. Certificate name A. P. S. Stuart. Stub amount $20.00. Certificate amount $2000.00. Register amount $20.00. Ledger amount $2,000.00. Date paid on Register, January 27th, 1892. Same on Certificate and Ledger. Names on Register A. P. S. Stuart.

No. 24986.

Date on stub, July 27th, 1891. Certificate date the same. Name on stub H. R. King. Certificate name H. R. King. Stub amount $1000.00. Certificate amount $7000.00. Register amount $1000.00. Date paid on Register August 7th, 1891.

I am unable to verify the date of the payment of this certificate for the reason that the stamp which has been put on here had too much ink on it and it is blurred, so that I cannot make out the month, but the the month appears to be August but the day of the month and the year I cannot tell, so that I could not tell anything about how that was paid. The ledger don't give the numbers of the certificates. This register gives the date of payment as August 7th, 1891.

476 Mr. DEWEESE: Does it give the amount?

A. There is a column here for showing the day of payment of each certificate, but it don't give the amount paid. You see if I knew the date there, the stamp date then I could verify it, I could look on the register of that date, and see if it was paid.

Mr. DEWEESE: What does the ledger show.

A. I couldn't state now. No I couldn't tell as to that one, on the ledger. I left that part of it blank here on my schedule. The name on the register is H. R. King.

The next is # 25047.

Stub date gives August 6th, 1891. Certificate date August 6th 1891. Name on Stub, J. E. Hill, Tr. Name on certificate the same. Stub amount $975.00. Certificate amount $37975.00. Register amount 975.00. Amount paid by the Ledger $37,975.00. Date of

payment on Register August 14th, 1891. Date paid on certificate, December 13th, 1892. Name on Register "Collections." Date paid on Ledger, December 13th, 1892. The next is No. 25056. Stub date August 8th, 1891. Certificate date August 8th, 1891. Name on stub Harper notes. Name on certificate, the same. Stub amount $1000.00. Certificate amount $7000.00. Register amount $1000.00. Date paid on Register August 14th, 1891. Date paid on Certificate Oct. 2nd, 1891. Issued on account of collections. Name on Register "collections. The Ledger payment and the amount of the payment I have not verified.

The next is # 25097.

Stub date August 17th, 1891. Certificate date August 17th, 1891. Name on Stub, J. E. Hill, Tr. Certificate name J. E. Hill, Tr. Stub amount $50.000. Certificate amount $50,000.00. Register amount $50.00. Ledger amount paid $50,000.00. Date paid on Register none. Date paid on certificate January 6th, 1893. The name on Register "Collections." Date paid on Ledger January 6th, 1893.

477 Q. Shown issued to whom by the register?

A. There are *tow* certificates of $50,000.00 that appear to have been paid on January 6th, 1893.

Q. Does the register indicate to whom that was issued?

A. I gave that "collections."

The next is No. 25380.

Stub date October 3rd 1891. Certificate date October 3rd, 1891. Name on stub Hattie E. Carson. Certificate name Hattie E. Carson. Stub amount $1100.00. Certificate amount $1100.00. Register amount $100.00. Ledger amount paid $1100.00. No date of payment on register. Date on Certificate October 3rd, 1892. Name on Register Hattie E. Carson. Date paid on Ledger October 3rd, 1892.

The next is # 25636.

Stub date November 18th, 1891. Certificate date Nov. 18th, 1891. Name on stub J. E. Hill, Tr. Certificate name J. E. Hill, Tr. Stub amount $50,000.00. Certificate amount $50,000.00. Regist- amount $100.00. Ledger amount paid $50,000.00. No date of payment on Register. Date paid on Certificate May 21st, 1892. Name on Register "Colls." Date paid on Ledger May 21st, 1892.

The next is No. 25691.

Stub date November 28th, 1891. Certificate date Nov. 28th, 1891. Stub name D. B. Welsh. Certificate name D. B. Welsh. Stub amount $10,000.00. Certificate amount $10,000.00. Register amount $100. Ledger amount paid $10,000.00. No date of payment on Register. Date on Certificate June 28th 1892. Name on Register D. B. Welsh. Date on Ledger June 28th, 1892.

The next is # 25861.

478 Stub date December 22nd, 1891. Certificate date December 22nd, 1891. Name on stub J. E. Hill, Tr. Certificate name, J. E. Hill, Tr. Stub amount $38,114.75. Certificate amount $38,114.75. Register amount $114.75. Ledger amount paid $38,-114.75. Date paid on Register December 22nd, 1892. Date paid

on certificate December 22nd, 1891. Date paid on Ledger December 22nd, 1891. Name on Register "Colls."

The next is No. 25862.

Stub date December 22nd 1891. Certificate Date December 22nd, 1891. Name on Stub J. E. Hill, Tr. Certificate name J. E. Hill, Tr. Stub amount $37,114.75. Certificate amount $37,114.75. Register amount $114.75. Ledger amount paid $37,114.75. No date of payment on the register. The stamp of payment on the certificate itself is blurred, so that I couldn't tell any more than it was during the year 1892 that it was paid, but I find on inspecting the ledger that a certificate for $37114.75 was paid on the ledger December 13th, 1892, and this stamp here has part of the figures 13 showing, so I presume the stamp was December 13th, 1892. The name on the Register is "do" being written immediately under the word "Colls."

The next number is # 25933

Stub date January 2nd, 1892. Certificate date January 2nd, 1892. Name on stub Mayer Bros. Certificate name, Mayer Bros. Stub amount $1000.00. Certificate amount $11,000.00. Register amount $1000.00. Amount paid on Ledger $11,000.00. No date of payment on register. Date paid on certificate January 3rd, 1893. Register name was Mayer Bros. and the ledger shows this certificate was paid January 4th, 1893. I think likely it came in on the 3rd at the close of business, and they stamped it as of January 3rd, and carried it over until the next morning. Those are all of the certificates which I have listed here, which show a difference in the
479 registration and the stub, or a difference between the register and the amount of the certificate itself.

Mr. DEWEESE: This last number you gave was alright was it?

A. Yes sir, that was alright.

Q. Have you also examined the certificates of deposit that were outstanding and unpaid at the time of the failure of the bank and were subsequently filed with the Receiver as a claim against the bank, and by him allowed, and compared them with the books of the bank, in the same manner as you have testified with reference to certificates of deposit in your preceding testimony?

A. I have made a comparison of certain certificates which were outstanding at the time of the failure, with the stubs of the same certificates, and the ledger, but the register of those particular certificates is not in the bank, not among the books of the bank,
480 so that I have not compared them with the register, but I have compared the certificates with the stubs and made an inspection of the ledger account with reference to those.

Q. Have you made search among the books of the bank to find that register?

A. Yes sir.

Q. Are you able to find it?

A. I am not.

Q. Now you may give a detailed history of those certificates the same as you have the ones you have just gone over.

No. 26818. Stub date May 16th, 1892. Certificate date May 16th

1892. Name on stub "Loup City Costs." Certificate name First National Bank, Poultney. Stub amount $3.00. Certificate amount $5,000.00. I find that on the ledger of that day there was a certificate for $3.00 issued, but I don't find that there was one for $5,000.00 issued. The Register is not here.

No. 27401. Stub date is August 18th, 1892. Certificate date August 13th, 1892. Name on stub is "costs." Certificate name George Olcott, Cashier. Stub amount $1.77. Certificate amount $5,000.

481 The ledger account of that day shows that a certificate for $1.77 was issued. The register is gone.

No. 27978. Stub date November 3rd, 1892. Certificate date October 31st, 1892. Stub amount "Int. Allct. Certificate name La Salle National Bank. Stub amount $3.00 Certificate amount $5,000.00 The ledger account shows that a certificate for $3.00 was issued on that day.

No. 28009. Stub date November 7th, 1892. Certificate date November 7th, 1892. Stub name "costs." Certificate name La Salle National Bank. Stub amount $3.00 Certificate amount $5,000.00 Ledger account shows a certificate for $3.00 issued on this date.

Q. I will ask you Mr. Whitmore if you have examined the books of the bank, and certain certificates of deposit, with reference to certificates of deposit that were outstanding and owing by the Capital National Bank at the time of its failure, and were filed with and allowed by the Receiver, and his certificates issued therefor, yet were shown by the books of the bank prior to its failure to have been paid?

482 A. I have made such examination as to a portion of the certificates.

Q. You may state the result of your examination, in the same manner as you did with reference to certificates of deposit testified to by you yesterday.

Q. I will ask you first, did you compare the original certificates with the books of the bank?

A. I compared the original certificates with the certificate Register, so far as the Certificate Registers were here, or was available for examination.

Q. I believe that you stated that there was one of the Certificate Registers gone.

A. Yes sir.

Q. And those you have compared relate only to the certificate, of which book of registration is here?

A. Yes sir.

Q. Now you may state the result of that investigation.

483 A. I found that Certificate Nembered 17458 issued January 9" 1888 to Effie B. Mosher for $210.00 was marked on the register as having been paid June 6th, 1889.

Q. Had the certificate been paid?

A. It was still outstanding when the bank failed.

Q. Was there any mark on the certificate indicating that it had been paid?

A. No sir.

Q. You may go on.

A. Certificate Numbered 17987 issued May 1st, 1888 to E. J. Randall for $1700.00 was marked "paid" on May 2nd, 1888, and was still outstanding when the bank failed.

Certificate No. 20292 issued June 19" 1889 to S. J. Gardner for $6000.00 was marked on the register "paid," September 26" 1889, and was still outstanding when the bank failed.

No. 23922 issued Feb. 2" 1891 to Thomas Farrell for $1015.00 was marked on the register as "paid, Feb. 21" 1891 was still outstanding when the bank failed.

No. 24541 issued May 9th, 1891 to Lydia Greenman for $371.66 was marked on the register as having been paid May 19th, 1891, and was still outstanding when the bank failed.

484 No. 24590 issued May 16th, 1891 to E. H. Allen for $641.60 was marked on the register as having been paid August 23" 1891, and was still outstanding when the bank failed.

No. 24852 issued July 6th, 1891 to N. Johnson for $1300.00 was marked on the register as paid August 3" 1891, and was still outstanding when the bank failed.

No. 24977 issued July 25th, 1891 to John A. Peterson for $250.00 is shown on the register as paid July 30", 1891, and was still outstanding when the bank failed.

No. 25003 issued July 29th, 1891 to Lydia Greenman for $230 is shown on the register as "paid" March 31, ——, and was still outstanding when the bank failed. The year is not shown it is marked "paid" 3/31—I will leave the year.

No. 25063 Issued August 10th 1891 to Thomas Farrall for $1062.12 is shown on the register as "paid September 14th, 1891" and was still outstanding when the bank failed.

No. 25129 issued August 22nd, 1891 to J. A. T. Hibbs, for $250.00 shown on the register as "paid September 21" 1891."—was still outstanding when the bank failed.

No. 25324, issued September 24th, 1891 to Samuel McClay, Receiver for $2423.97, is shown on the register as "paid September 28" 1891" and was still outstanding when the bank failed.

No. 26142 issued February 4th, 1892 to F. O. Truell for $300.00 was marked on the register as having been paid March 3" 1892,—as to that last one the register shows 3/3 as the month, and day,—and the one before it was 2/24/92 paid. It may have been intended for 3/3/92.—As to the other certificates that were outstanding, I think that the register is gone.

(COURT:)

Q. What is the footing of that?

A. I have not totaled it yet.

Q. Please do that.

A. $15954.35.

485 (COURT:)

Q. There are no entires in the Journal, or Ledger accounts that indicates anything in relation to those matters at the time of the alleged payments as shown by the register, is there?

A. I have not checked the ledger account to see if there were any of these accounts paid, I couldn't very well. I could tell by an inspection of the depositors' Daily Balance book, or Depositors' Ledger No. 2, in which they kept the Certificate accounts, whether any of these amounts were paid on this day. But as I stated yesterday there is no way of identifying certificates except by a similarity of amounts.

(COURT:)

Q. Did you examine the Daily Balance Book, as to that?

A. No sir, I have not.

Q. I will ask you if you have made an examination of the books of the Capital National Bank to ascertain the amount of money it was owing on account of Certificates of Deposit outstanding at the time of the failure of the bank?

A. Yes sir.

Q. Now I will ask you to state, did it keep more than one such account on its books?

A. Yes sir, they kept three accounts.

486 Q. How were they indicated, to separate them?

A. They were numbered 1-2 and 2, or 1-3 and 4. They had four numbers they used,—I never quite understood why they used the number "4," but the accounts would be number 1-2 & 3,—and then I think 1-3 & 4, or 2-3 & 4 when the bank closed.

Q. Did you say you made an examination of the books of the bank with reference to the certificates of deposit outstanding as shown by the bank's books?

A. Yes sir.

Q. You may state what the books of the bank show that it owed for certificates of deposit outstanding immediately prior to the suspension of the bank January 21", 1893.

A. The Depositors Daily Balance Book, No. 2, for January and February 1893, on the day of the failure of the bank showed in Certificate of Deposit account No. 4 $97301.27 of certificates of deposit issued by the bank and outstanding and unpaid at that

487 date. Certificate of Deposit account No. 3, at the same time, and in the same book showed that they had paid more certificates than had been issued in that account to the amount of $10527.46. The certificate of deposit account was overdrawn $10527.46, they had paid more certificates than they issued, apparently, by that amount. Certificate of deposit account No. 1 on the same book at the same time, showed an overdraft of $508.11, showing that they had paid more certificates than had been issued in that account by $508.11, making a total overdraft in these two accounts of $11,035.57,—that they had paid more certificates than had been issued.

Q. And if you deduct the amount of this overdraft from the amount shown in account No. 4, what does it leave as the net amount?

A. Answering the question, the net amount of course would be the difference, $86,265.70.

(JUROR:)

Q. The certificates of deposit outstanding against the bank at that time.

488 A. Yes sir, according to the Depositors' Daily Balance Book No. 2, in which the account was kept, when the bank failed.

Q. Did you examine the books of the Receiver which are here in court, so that you are able to state the amount of certificates of deposit that were actually outstanding at the time of the failure of the bank, and were subsequently filed with the receiver and allowed as a claim against the Capital National Bank, and Receiver's Certificates issued therefor?

A. Yes sir.

Q. Have you examined the original certificates, exhibits No. from 147 to 923 inclusive, being the certificates of deposit referred to in the deposition of McDonal, Young, Outcalt, Hale and compared them with the books of the Receiver, so as to verify the amounts and numbers of the certificates actually outstanding and as shown by the Receiver's books as filed and allowed?

A. I have.

Q. Are these exhibits 147 to 923 inclusive the certificates of the Capital National Bank that were identified by those witnesses, (referring to a bundle of certificates apparently)?

A. Yes sir.

Q. And you have compared them with the Receiver's books, each one separately, so that you are able to testify and know that the amount represented — these certificates has been allowed as a claim against the Capital National Bank, by the Receiver?

489 A. I have as to the certificates that are here in this package.

Q. Being the ones identified as exhibits 147 to 923 inclusive?

A. Yes sir.

Q. Have you examined those certificates so as to be able to state whether there is any mark or stamp on the certificates, indicating that they had been paid by the bank at any time prior to its failure?

A. Yes sir.

Q. Is there any "paid" stamp, or any indication on the certificate of there having been paid?

A. No sir.

Q. Now you may state Mr. Whitmore if you are able to state the total or amount of such certificates that were outstanding at the time of the failure of the bank. Have you examined the account of the Receiver and compared it with these certificates?

490 A. Yes sir.

Q. Are you able to state the total amount of certificates of

the Capital National Bank that were outstanding and unpaid at the time of its failure?

A. Yes sir.

Q. You may state the amount.

A. The total amount, as I have footed it, is $517,499.49. This includes a certificate of $150,000.00 issued to the State Treasurer, but that certificate has not been in my possession and as to that I take it from the Receiver's record.

Q. Now I will ask you to state if you have examined the certificates of deposit account, as shown on the books of the Capital National Bank with reference to any irregularities or peculiarities in the method of its keeping.

A. I have.

Q. You may state some of the irregularities you find.

491 A. On January 6" 1893 certificate of deposit account No. 4 on the Balance Ledger No. 2, showed a total of,——

(Mr. WHEEDON:) May I ask what paper you are reading from?

A. This is a memorandum,——

(Mr. WHEEDON:) In answer to the question ask- you, you are reading from some paper are you not?

A. I am refreshing my recollection.

(Mr. WHEEDON:) Are you reading from some paper?

A. No sir.

(Mr. WHEEDON:) Were you when I interrupted you?

A. No sir.

(Mr. WHEEDON:) What was the paper you held before you?

A. A memorandum made by myself.

(Mr. WHEEDON:) Will you read from it so far as you have gone so it may be put into the record?

492 (Mr. WHEDON:) You used the paper to which you refer for the purpose of refreshing your recollection?

A. Yes sir.

(Mr. WHEDON:) What is your number upon that paper?

A. Number 10.

Q. You may state some of the irregularities you find.

A. (answer continued). $15231.58 for certificates of deposit that were then outstanding and unpaid. On this day there was charged to this account a total of $106,765. of certificates paid, and none were issued, or entered as issued. That is, the bank paid out $91,533.42 more in certificates than this account showed it owed. I will state to the cou-t that these certificates that are here bearing a stamp, there is "Certificate No. 3" stamped on the corner of the certificate,—other certificates here have No. 4 stamped on, I take it that that was to indicate that the account that should be credited or charged was indicated by that number.

In certificate of Deposit Account No. 3 on January 16th, 1893 the book showed a balance of $4978.19, certificates unpaid. There were none issued that day on this account, but there was paid on this account on that day a total of $9250., or $4271.81 more than the books showed were outstanding in this account.

No certificates were issued in this account after January 16" 1893

and yet there were paid on this account on January 17th, $1750.65. On the 18" $370/00; On the 19" $795.00; On the 20th $990.00 and on the 21st, $2350. making a total of $10,527/46 that were paid more than the account showed that they had outstanding and making the overdraft in that account which I have already testified to. Now account No. 1, on January 17", 1893 was overdrawn $108.11 and on this day there was paid the sum of $400.00 which made the total overdraft on this account $508.11 being the amount
493 that I have heretofore given as the overdraft.

(Answer continued). If the court please I desire to correct one statement that I made that I think was erroneous in regard to certificate of deposit account on January 6th, 1893. I think I said that none were issued on that day. There were certificates issued on that day but there were none of the certificates issued on that day, which were apparently paid on the same day so as to go into the other side of the account.

Q. I now hand you exhibit #140 being a certificate of deposit of the Capital National Bank for $100,250.00 purporting to have been issued to J. E. Hill Treasurer, and ask you if you have compared that certificate with the books and traced it on the books of the Capital National Bank?

494 A. I have examined the certificate and the certificate register and the Deposit Ledger containing the account of certificates of deposit.

Q. And the general books of the bank?

A. Yes sir.

Q. You may state Mr. Whitmore what books you have examined with reference to the certificate referred to and the transaction it purported to represent.

A. That depends upon the meaning of your question,—as to the certificate itself I have examined the Certificate Register, and the Ledger containing the certificate account.

Q. I will ask you to state Mr. Whitmore, referring to the certificate register in what manner the bank can ascertain what certificates of deposit are outstanding and unpaid,—this bank.

495 A. As to the total amount of certificates outstanding on any given date that should be shown by the account in the Depositors' Daily Balance Book No. 2. To prove that account a list of the unpaid Certificates can be taken from the Certificate of Deposit Register.

Q. Can you state from this deposit book you refer to what specific certificates of deposit are outstanding and unpaid at any given time?

A. What do you *maen* by deposit book?

Q. Upon what book do you say the general balance of certificates of deposit on each day are shown?

A. In this book—it is Depositors' Daily Balance Book No. 2.

Q. Can you tell or can any one tell by reference to this
496 depositors' Daily Balance Book what specific certificates of deposit are outstanding on any day, even if the book is correctly and regularly kept?

A. No sir I cannot and no one else can.

Q. You may explain why that is true.

497 A. Because the numbers of the certificates issued, and paid is not given on this Depositors' Daily Balance Book No. 2.

Q. Nor the name of the holder of the certificate?

A. Nor the name of the person to whom issued.

Q. Is there a book of the bank in which you can find that information?

A. Yes sir,—there is a book from which you can find what certificates have been issued and the names of persons to whom they are issued, and the amount issued, and the date when the particular certificate was paid.

Q. What book is that?

A. That is the book called "Certificate of Deposit Register."

Q. Can you tell by reference to the stub book of certificates issued whether any given certificate has been paid?

498 A. No sir, you can not.

Q. Then is there any other book kept by this bank except the Certificate of Deposit Register by which any one can tell whether a certain certificate is outstanding and unpaid on any given date?

499 A. There is no other book.

Q. You may state how you can ascertain what certificates are outstanding, and with what book the certificates of deposit register must agree if correctly kept.

500 A. To ascertain what certificates of deposit are outstanding on a certain day, that is the last business day that the bank had transacted business for instance, you would take off from the certificate of deposit register a list of the numbers and amounts, or the amounts alone of all certificates which were not marked paid upon the certificate register. The total of such certificates should agree with the total of certificates outstanding as shown in the account upon the Depositors' Daily Balance Book No. 2.

Q. And the total of certificates shown on the Certificate of Deposit Register as unpaid, should agree with the account in this Balance Book to which you refer?

Q. With what book if any or account, should the total of certificates outstanding and unpaid, as shown by the certificate of deposit register, agree.

501 A. I have already stated that they should agree with the balance shown on the same day in the Depositors' Daily Balance Book No. 2.

Q. Now you may state if the books show the issuance of this certificate No. 24452 for $100,250.00 issued to J. E. Hill, Treas. Exhibit No. 140.

A. Yes sir, the book shows the issuence of this certificate.

Q. What book do you refer to?

A. Certificate of Deposit Register.

502 Q. Do any of the other books of the bank show its issuance?

A. Yes sir.

Q. What book?

A. The Certificate account in the Depositors' Daily Balance Book No. 2 for March and April, 1891. Certificate account number two, under date of April 25", 1891.

Q. Upon what date does it appear upon the books of the bank, the entry, of the issuance?

A. I just stated that. April 25th 1891.

Q. Does that refer to certificate No. 24452 which bears date April 21st 1891.

A. It is the same amount. No certificate for that amount is entered on the books for April 24th, so that it must be the same certificate entered on the 25. No number is mentioned on the balance book.

Q. Now you may state if on this same day any other account carried on the books of the bank received a credit of like amount.

A. Yes sir.

Q. What account is it, and where do you find it?

503 A. In the same balance book, Depositors' Daily Balance Book, No. 2, under date of April 25th, 1891, the Nebraska Relief Committee has a — of $100,250.00.

Q. Do the books of the bank show,—you may state if the books of the bank show a credit to this Nebraska Relief Fund of $100,250.00, and also the issuance of the certificate of deposit in the sum of $100,250.00.

504–519 A. The books show both transactions.

Q. Now you may state when that certificate of deposit No. 24452 purports to have been paid by the bank as shown by the certificate, or its books.

A. I am unable to state from the stamp on the certificate when it was paid. The Certificate register shows payment 4/28/91.

Q. What does that indicate?

A. April 28th 1891, the depositors' Balance Book, No. 2, C/D account. No. 2 shows that a certificate for this amount was paid on that day. The certificate that appears upon the register under date of April 24th, and is dated April 24th, but it does not appear in the account on the Balance Book until the 25th.

* * * * * * *

520 Q. You testified this afternoon that on the same day that this certificate of deposit for $100250.00 was issued to Mr. Mosher that also a credit of that same amount was entered upon the books of the bank to the account of the Nebraska Relief fund, did you?

A. Yes sir.

Q. Now you may state if you have examined the books of the Capital National Bank to ascertain if this credit of $100,250.00 to the acount of the Nebraska Relief fund has been taken, or checked out of that account as shown by the bank books.

A. Yes sir, I have.

Q. You may state what disposition has been made of that credit

to the Nebraska Relief fund as shown by the books of the bank.

521 A. The amount of the credit to the Nebraska Relief committee was withdrawn by means of charges made at various times to the account.

Q. Charges on account of what?

A. Charges on account of the Nebraska Relief committee.

Q. But how were those apparently drawn out?

A. Well the books simply show charges to the account,—whether they were checks drawn by somebody, or whether they were orders or vouchers, which were paid, I have no means of knowing. They are simply charges made against the account there must have been some authority to the bookkeeper to make those entries, the form of the authority of course I do not know.

Q. Does the account appear by the books to have been run for some time and to have been drawn out in small items, or in one lump sum?

522 A. It ran for a considerable length, of time, and I think there were other deposits made to the account, and there were numerous charges made from day to day until the account was wiped out, and in fact there became an overdraft in the account, and then that was made good by means of deposits or credits to the account.

Q. Have you examined the books of the Capital National Bank during the month of December 1889 so that you can state whether or not the bank had an account on its books with J. E. Hill?

A. I have.

Q. Did it keep such an account?

A. They did.

Q. You may turn to the book and page where such an account is kept.

A. Depositors' Balance Book No. 1 for November and December 1889 on the page beginning with the name of "Honneywell J. H." the second entry from the bottom of the page.

Q. When does that account appear on the books for the last time under his name?

A. "J. E. Hill, Tr" the account is closed December 24th, 1889.

Q. What becomes of the account after it is closed on this date?

A. There is a charge of $23,328.75 made to the account, and there is a circle drawn around the charge which would indicate that it was not to go on the depositors' pass book. And I find that on the same day was opened an account on the Balance Book No. 2 called "State Treasurer," and this balance or charge to the account of J. E. Hill is on that date entered as a deposit to this new account State Treasurer $23,328.75.

Q. Are the amounts identical in each account?

A. Yes sir, the debit and credits correspond to each other.

Q. Calling your attention to the account in the balance Book, November and December 1889 No. 2, under date of December 24th,

in the account of "State Treasurer" wherein appears in
523 credits two items as follows,—$23,328.75, and under it $100,000.00 I will ask you if that indicates that there has been any changes, or erasures?

A. There has been some work done there with a knife apparently in scratching the figures.

Q. I will ask you if you have examined this Balance Book, for November and December 1889, No. 2 identified as Exhibit No. 46, with reference as to whether or not that book is in balance.

A. I have.

Q. Have you examined it for December 23" 1889?

A. Yes sir.

Q. And for how long subsequent?

A. Well I footed the balances for the 23rd, 24th and 26th days of December 1889, and I have examined the balance books at various dates from that time down to the first of January 1892.

Q. Does the book which you are referring to contain the deposit account during the months of November and December 1889?

A. It contains the deposit accounts of the Individual depositors from the letters "M" to "Z," including Certificates of Deposit.

Q. And one of those books was used for two months including the names of depositors whose names began with the letters from "M" to "Z"?

524 A. Yes sir.

Q. Now you may state if the book referred to, Exhibit 46, is correctly footed on December 23" 1889.

A. On December 23rd 1889 the book is correctly footed.

Q. Is it correctly footed on the next business day, which was December 26th, 1889?

A. It is not.

Q. You may state the nature of the discrepancy, or error.

A. There is an error or discrepancy of $100,000.00 in the footings.

Q. Wherein does that error occur if you can tell.

A. It occurs in the footing of the page beginning with the name of Scott I. M.

Q. Is that the page upon which occurs the account of "State Treasurer"?

A. Yes sir, it is the 26th.

Q. On this 24th day of December when this credit of $100,000.00 appears in the account of "state treasurer" you may state if there was a check drawn against the account, and a charge shown, on this same book, under the same date, December 24th, 1889.

A. There is a charge against the account of "state treasurer" on December 24th, 1889 of $50,000.00.

Q. It is the same day that the credit of $100,000.00 is given?

A. Yes sir.

Q. Have you examined the books from this time, December 24th, 1889 and subsequent to that time to ascertain how long this discrepancy of $100,000.00 continues to exist on the books?

A. Yes sir, I have.

Q. You may state now how far that appears on the books, how long it continues?

525 A. It continues every day upon this balance book No. 2 of November and December from the 26th day of December until the first of January 1890.

Q. When this book is closed, and used up, what becomes of the accounts in that book?

A. They are transferred to another book. Balance Book, No. 2 for January and February 1890.

Q. Does this same discrepancy of $100,000.00 exist in the book which follows and succeeds this one?

A. Yes sir, and in all books down to the 28th day of December 1892.

Q. Do you mean to state that this book Exhibit 46, and all books of like kind which succeed and follow, and in which these same accounts were kept, continued to be out of balance to the amount of $100,000.00 from December 26th, 1889, to December 28th, 1892.

526 A. In my former answer where I stated December 28th, make that December 15th, 1892. These deposit books were out of balance until December 15th, 1892. The total of deposits carried on the General balance book from December 15th to 28th, 1892 was $100,000.00 less than the total carried on the depositors' balance books.

(Mr. DEWEESE:).

Q. The depositors' balance then was correctly footed from December 15 to 28th, 1892,—it was correctly footed with the balance entered of $100,000.00?

A. No sir. They simply made their corrections in the footing but upon the General Balance books they showed $100,000.00 more than the actual deposits were. Now the footings on the Balance Books from December 26th, 1889 to December 15" 1892, the footings as they are made, the totals, deducting the overdrafts, agree with the total of deposits shown on the General Balance Book. They incorrectly footed these balance books during all of that time, and that incorrect footing was then shown upon the general Balance Book, so that at the times from December 26th down to the date I have mentioned the General Balance Book showed just $100,000.00 less than the actual deposits of the bank.

(Mr. DEWEESE:)

Q. Instead then of being a "forced balance" it was a forced unbalance of $100,000.00.

A. Yes sir, they made a forced balance upon this book, and then carried it to the General Balance Book.

Q. If the individual Balance Book had been correctly footed, what would have been the effect as to increasing or decreasing the total amount of deposits as shown by the books?

527–530 A. If the book had been correctly footed it would have shown $100,000.00 more deposits than the total showed as entered.

Q. Do you mean by that, that it would have shown a liability of $100,000.00 more than it did actually show by making the error in footing?

A. Yes sir.

Q. Is this General Balance Book you speak of, the one you referred to two or three times, in which the balances of accounts are all entered?

A. Yes sir, it shows the resources and liabilities of the bank, each business day of the year.

* * * * * * *

531 Q. Now you may state if you have examined the Journals of the bank during these periods to ascertain if on the day this credit of $100,000.00 appears to the account of the state treasurer, if that amount was entered on the Journal of the bank?

A. I have.

Q. You may state if that amount of $100,000.00 was ever entered upon the Journal of the bank?

A. The amount of $100,000.00 would not appear upon the Journal as an independent or separate item, but it would be included in the total of deposits shown on the Journal for that day.

A. It wasn't entered at all upon the Journal for that day.

COURT: You mean to say that that is the first and only entry, is upon the Depositors' Balance Book?

532-534 A. Yes sir.

COURT: And that was the original and not by transfer?

A. It was entered from a deposit ticket I presume, if there was one, this is the book of original entry of the deposits and the several accounts of depositors.

COURT: But the One Hundred thousand dollars was not included upon the Journal?

A. The One Hundred thousand dollars does not appear upon the Journal.

Mr. THOMAS: Does it appear upon the General Balance book?

A. No sir.

* * * * * * *

535 Q. The fact that if the individual deposit book, and the items properly taken to the General Balance book would have shown the General Balance book out of balance $100,000.00 would that indicate to you that any credit was given at the time to the account of the State Treasurer?

A. It, alone, would not indicate that to me.

Q. What do you mean by that answer?

A. Well the fact that a deposit is entered upon the books to the credit of any account presumes the fact that there was a deposit made for that amount, that the bank actually received that money.

Q. But if the effect of that entry increased the liabilities $100,000.00 and there was no corresponding entry, or, the other side was $100,000.00 less would that indicate that anything of value was received for which that entry was made?

A. Well it wouldn't disprove the presumption that the bank received something of value. If I go into a bank and make a deposit of $100,000.00, it is credited to my account. Now it has gone into the possession of the bank. Some individual in the bank may take that $100,000.00 and put it in his pocket. It is withdrawn from the cash of the bank, but I had made the deposit. Now the fact that this $100,000.00 is credited to that account would indicate that the bank had received $100,000.00 on that day.

Q. Would the fact that the books if properly kept would
536 show $100,000.00 less assets than liabilities would that indicate that the $100,000.00 was put among the assets of the bank on that day?

A. That is a different question. This indicates that the bank received $100,000.00 these entries that were made here, and the difference between the total amount of the deposit shown on the General Balance book, and the total amount shown on the individual balance book would indicate that $100,000.00 was abstracted in some way on this day.

Q. When do you say this account was finally correctly footed, and made to agree with the General Balance Book?

A. The correct footings are shown on December 25", 1892.

Q. And when does it agree with the amount carried to the General Balance Book?

A. December 28th, 1892 the correct totals upon the individual balance book agree with the correct total on the General Balance Book.

* * * * * * *

Q. On what day do you say they were made to agree?

A. On the 28th day of December 1892 the totals agree.

Q. I will ask you if on that day any notes were taken into the bank and charged to its Bills Receivable account?

A. Yes sir, on December 28th, 1892 there were notes placed in the bank.

Q. You have examined the books to ascertain the fact?

A. Yes sir.

Q. Now you may state what notes went into the bank that day, and were charged to its Bills Receivable account.

A. Well there were a number of notes.

537 Q. Was there one signed by C. W. Mosher?

A. The books show that a note of C. W. Mosher, two notes of C. W. Mosher were put into the bank that day.

Q. Give the numbers and the amount.

A. No. 50642, $20,000.00, and # 50643, $20,833.34.

Q. Were there any notes went into the bank that day that were signed by Mr. Outcalt?

A. Yes sir.

Q. Give the number and the amount.

A. # 50640 R. C. Outcalt, $15,000.00, and # 50641 R. C. Outcalt, $14,166.66.

Q. Making a total of how much?

A. $70,000.00.

Q. Now on that day was there an account of Mosher and Outcalt carried on the books which had a credit to it of $30,000.00?

A. Yes sir.

Q. What became of that account that day?

A. There was charged to that account $30,000.00.

Q. Did that take off the entire account?

A. I don't know as to that.

Q. Would that indicate, this charge to that account of $30,000.00?

A. That a check of Mosher & Outcalt had been drawn for that amount on that account and paid that day.

Q. And the two notes of Mr. Mosher, the two notes of Mr. Outcalt, and the check of Mosher and Outcalt make a total of how much?

A. $100,000.00.

Q. Do those entries appear on the books the same day that you say that the books are made to agree, and are properly footed?

A. It is upon the same day that the two totals do agree.

Q. Now referring to this account of Mosher and Outcalt, which at the time had a credit of $30,000.00 I will ask you if you
538 have examined the books of the bank so that you are able to state how long this account had had that credit prior to this day, and when it obtained it as shown by the books?

A. The account of Mosher & Outcalt ran for some time with the bank, that is there has been an account there on the Depositors' Balance some time prior to this date.

Q. I call your attention to the account of Mosher & Outcalt under date of December 24th, 1892, and ask you to examine the book and state if at that time this account received a credit of any amount?

A. Yes sir.

Q. For what amount?

A. $30,000.00.

Q. And on the same day did the books of the bank show that Mr. Mosher & Outcalt gave any notes to the bank?

A. They do.

Q. You may state for what amount, and the numbers and who gave them?

A. No. 50638 C. W. Mosher $17,500.00; and No. 50639 R. C. Outcalt $12,500.00.

539 Q. And these two notes taken together do they equal the amount of the credit which the account of Mosher & Outcalt was given that day?

A. Yes sir, they equal $30,000.00.

Q. I will ask you to state if you have made an examination of the books of the Capital National Bank to ascertain what were the assets and the liabilities of the bank at the time of the suspension of the bank as shown by the bank's books?

A. I have.

Q. You may state what were the assets of the bank as shown by its books on January 21st, 1893.

Q. I will ask you if the books showing the condition of the bank at the time of the failure are in court?

A. Yes sir.

Q. You may state what were the assets of the bank as shown by i s books on January 21st, 1893.

A. $1,031,157/40.

540 Q. You may give the items that comprise that amount.

(Mr. DEWEESE:) You now propose to read from something, please state what you propose to read from.

A. It is from Exhibit 21.

(Mr. DEWEESE:) Whis is the General Balance Book, of the Capital National Bank. By whom does that purport to have been kept, the entries written, or by whom were they written if you know?

A. I don't know who actually made the entries here, but they were made by a bookkeeper in the bank.

(Mr. DEWEESE:) You don't know who that bookkeeper was?

A. No sir, I don't know, there is nothing to indicate who kept the journal.

A. In giving the total of the assets I give the net total deducting the amount of circulation or United States bonds to secure circulation, I give just simply the excess of bonds, which makes a difference of $45,000.00 as shown in this General Balance Book.

Mr. THOMAS: We offer in evidence page of the General Balance Book "C" of the Capital National Bank identified by the reporter as Exhibit No. 1033 except the lead pencil memorandum contained thereon.

541 (Mr. DEWEESE:) This page is offered by the plaintiff, I would like to ask the witness what the first column of figures is the first column on the left hand side, the left hand column under the name "Monday" is a credit or debit.

A. And what does the other column immediately to the right represent?

A. The liabilities. I might explain that this bank kept its General Balance Book, the entry of balances, as of the morning of the day given at the top of the page, so that these balances on this page are really the balances in this account at the close of business on Saturday January 21st, that was the last business day of the bank.

(Mr. DEWEESE:) The 22nd was Sunday and these were entered up on Monday morning?

A. Yes sir.

Q. You mean the entries there appearing under Monday the 23rd, what day's business is that?

A. I have explained that that was Saturday's business, at the close of business on Saturday the 21st.

Exhibit No. 1033, read in evidence as follows,—

"Monday Jan'y 23/93.

Capital stock	.....	$300,000.
Surplus %	.....	6,000.
U. S. Bond %	$50,000.	
Circulation %	.....	45,000.
Redemption Fund	1,400.	
Stock and bond %	325.	
Furniture %	5,770.	
B/R	851,880.07	
Cash	28,731.79	
Bills of Exchange	4,997.97	
Chemical Nat. Bank	.....	37,196.99
542 Am. Exch. Nat. Bank	.....	2,228.23
U. S. Nat. Bank, Omaha	4,552.99	
South Omaha Nat. Bank	2,371.16	
Packers Nat. Bank	3.27	
First Nat. Bank Kans. City	600.38	
Schuster Hax Nat. Bank	882.17	
Blackstone Nat. Bank	1,079.86	
Merchants Nat. Bank, Neb. City	.....	250.11
First Nat. Bank, Beatrice	2,709.18	
Knauth Nachod & Kuhne	220.70	
Walsh & Putnam	2,800.	68,694.72
Clearing House %	.....	965.95
Undivided profits	.....	6,457.20
Real estate %	112,533.16	
Wages %	1,193.33	
Suspense %	69.	
Discount Int. & Exch	.....	1,920.00
Interest paid account	2,787.87	
Expense %	1,249.46	
Deposit %	.....	607,444.00
	1,076,157.40	1,076,157.40

Q. Referring to the page just introduced in evidence Exhibit No. 1033, wherein appears the items "deposit account" $607,444.00. I will ask you to state what that contains, that account, that is whether it contains both certificates of deposit and open deposit accounts?

A. It contains both, contains individual deposits, all country bank deposits and all certificates of deposit. They had two depositors' balance books and then a bank balance book.

Q. Now you may state what portion of that amount constituted the individual and open ac-ount deposits.

A. This item of $607,444.00 is the net amount of their deposits. The overdrafts having been deducted from the gross deposits.
543 Adding the overdrafts the deposits are $640,952.14. Deducting the certificate of deposit account it would leave the individual check deposits, and the bank deposits $543,650.87.

(Mr. Deweese:)

Q. Is that at the time the bank failed?

A. Yes sir.

Q. I will ask you to state if you have made an examination of the books of the bank to ascertain some of the notes that were carried by the bank as Bills Receivable and were a part of its assets at the time of its failure, or suspension.

A. No sir, I have made no examination of the books of the bank with that in view.

Q. Have you made an examination of any of the books?

A. I have examined the books of the Receiver as to Bills Receivable which were on hand at the time of the failure of the bank as shown by his records, and have examined the books of the bank as to the registration of those particular notes on the books of the bank.

Q. You mean to state that you have examined the notes of the Receiver as on hand as part of the assets of the bank, and so shown on his books?

A. No I don't mean to say I have examined the notes.

Q. Have you examined the books?

A. Yes sir.

Q. And have compared them with the books of the bank?

A. Yes sir, I have examined the books of the bank with reference to particular paper that was listed on the books of the Receiver, but not as to all of the paper that was listed on the books of the Receiver.

Q. I say as to part of it.

A. I say I have as to certain notes.

Q. Now you may state if you find among the notes referred to, any that were executed by C. W. Mosher?

544 A. I find in the books the record of notes that were made by C. W. Mosher.

(Mr. Deweese:)

Q. You didn't see the notes and you don't know who did make them, you simply saw the record of the note in the Receivers book purporting to be a note made by C. W. Mosher?

A. Yes sir, and the same record in the bank books, the Discount Register of the bank shows that a note similar to the note recorded by the Receiver, was there entered.

Q. You may give a list of the notes you find executed by Mr. Mosher giving the number and the amount.

A. There are in the assets of the bank, coming into the possession of the Receiver at the time of the failure, now—they went into the assets of the bank, into the statement of the assets of the bank at the time.

(Mr. DEWEESE:)

Q. And the foundation you have for saying that is that you find these listed in the Receivers book, and find a corresponding register in the books of the bank?

545 A. I don't know whether the Receiver ever had these notes or not, of course.

Q. The notes which you refer to are the notes which are listed on the Receivers books as a part of the assets of the Capital National Bank coming into his hands as Receiver?

A. Yes sir.

Q. And have you compared them with the books of the Capital National Bank as to the amounts and numbers and makers so that you know that these notes were entered on the Discount Register, and also entered on the books of the Capital National Bank as a portion of their assets, and a part of its Bills Receivable?

A. Yes sir.

Q. You may give the list as above asked.

546

Number.	Maker.	Date taken in bank.	Date of note.	Due.	Amount.
50632	C. W. Mosher.....	Oct. 27-'92	Oct. 27-'92	Jan. 28-'93	$10,000.00
13000	C. W. Mosher.....	Aug. 10-'92	Aug. 10-'92	Feb. 13-'93	1,948.33
50637	C. W. Mosher.....	Dec. 20-'92	Dec. 20-'92	Jun- 20-'93	5,000.00
50644	C. W. Mosher.....	Dec. 31-'92	Dec. 30-'92	Jul- 2-'93	5,000.00
50642	C. W. Mosher.....	Dec. 28-'92	Nov. 11-'92	Mar. 14-'93	20,000.00
50643	C. W. Mosher.	Dec. 28-'92	Dec. 12-'92	Mar. 15-'93	20,833.34
50638	C. W. Mosher.....	Dec. 2-'92	Dec. 24-'92	Jun- 27-'93	17,5000.00
50633	C. W. Mosher.....	Oct. 27-'92	Oct. 27-'92	Apr. 30-'93	5,000.00

Q. Making a total of how much?

A. 85,281.67.

Q. Have you made a similar examination with reference to notes signed by Edwin W. Mosher?

A. I have.

Q. And can you state the notes that were on hand with the Receiver as assets of the Capital National Bank, that were also a part of the assets of the bank as shown by the books of the bank at the time of its falure, as shown by the books of the Receivers, and as you have compared it and verified it by the books of the bank?

A. I can give a list of the notes of Edwin W. Mosher which appear upon the books of the Receiver, and I have investigated the books of the bank and find the same notes entered upon the Discount Register as having been received by the bank.

Q. And were entered in the general books of the bank?

A. Yes sir.

Q. You may give the list in the same manner as you did with reference to C. W. Mosher.

547

Number.	Maker.	Date taken in bank.	Date of note.	Due.	Amount.
131000	Edwin W. Mosher...	Jul- 6-'92	Jul- 7-'92	Jan. 8-'93	$5,000.00
131001	" " " ...	Jul- 6-'92	Jul- 5-'92	Jan. 8-'93	5,000.00
131002	" " " ...	Jul- 6-'92	Jul- 5-'92	Jan. 8-'93	5,000.00
131003	" " " ...	Jul- 6-'92	Jul- 5-'92	Jan. 8-'93	5,000.00
134007	" " " ...	Oct. 19-'92	Oct. 15-'92	Apr. 18-'93	12,730.00
134008	" " " ...	Oct. 19-'92	Oct. 15-'92	Apr. 18-'93	10,600.00
134009	" " " ...	Oct. 19-'92	Oct. 15-'92	Apr. 18-'93	8,611.00
134010	" " " ...	Oct. 19-'92	Oct. 15-'92	Apr. 18-'93	5,000.00
134011	" " " ...	Oct. 19-'92	Oct. 15-'92	Apr. 18-'93	5,000.00
136005	" " " ...	Dec. 27-'92	Dec. 27-'92	Jun- 30-'93	2,500.00
50101	" " " ...	Jul- 8-'91	May 1-'91	Demand ...	5,903.77
50102	" " " ...	Jul- 8-'91	May 1-'91	Demand ...	5,505.68
50103	" " " ...	Jul- 8-'91	May 1-'91	Demand ...	5,623.70
50104	" " " ...	Jul- 8-'91	May 1-'91	Demand ...	4,307.28
50105	" " " ...	Jul- 8-'91	May 1-'91	Demand ...	3,968.25
50106	" " " ...	Jul- 8-'91	May 1-'91	Demand ...	6,000.00
50108	" " " ...	Jul- 8-'91	May 1-'91	Demand ...	6,881.18
50109	" " " ...	Jul- 8-'91	May 1-'91	Demand ...	5,963.86

Q. Making a total of how much?

A. 106,594.92.

Q. Now you may state if you have made a similar investigation with reference to notes of the Wester- Manufacturing Company signed by E. Hurlburt Jr. Manager.

A. Yes sir, I have.

Q. Now you may give the list of them, just as you have the notes of C. W. and Edwin W. Mosher.

A. I will state that these notes of the Western Manu-
548 facturing Company, that I shall give here, are notes that appear by the record to have been signed "Western Manufacturing Company by E. Hurlburt Jr. Manager.

A. As to some of the notes of the Western Manufacturing Company I have examined the notes themselves, which are in possession of the Receiver, I think there are some thirty six notes.

Q. And the others you get from the Receivers books?

A. Yes, sir, and the registration books.

549

Number.	Maker.	Date taken in bank.	Date of note.	Due.	Amount.
122018	Western Mfg. Co.....	Aug. 24-'92	Jun- 17-'92	Dec. 20-'92	$5,000.00
122016	"	Jul- 30-'92	Jun- 17-'92	Dec. 20-'92	5,000.00
131017	"	Sep. 20-'92	Jul- 20-'92	Jan. 29-'93	5,000.00
132012	"	Oct. 19-'92	Oct. 20-'92	Feb. 23-'93	5,000.00
132009	"	Oct. 17-'92	Aug. 6"-'92	Feb. 9-'93	5,000.00
132008	"	Oct. 17-'92	Oct. 1-'92	Feb. 4-'93	5,000.00
132010	"	Oct. 17-'92	Aug. 14-'92	Feb. 17-'93	5,000.00
133009	"	Oct. 10-'92	Sep. 22-'92	Mar. 25-'93	5,000.00
133011	" ...	Oct. 19-'92	Sep. 6-'92	Mar. 9-'93	5,000.00
133012	" ...	Oct. 19-'92	Sep. 10-'92	Mar. 13-'93	5,000.00
133013	"	Oct. 19-'92	Sep. 14-'92	Mar. 17-'93	5,000.00
133015	"	Oct. 19-'92	Sep. 27-'92	Mar. 30-'93	5,000.00
134002	"	Oct. 17-'92	Oct. 1-'92	Apr. 4-'93	5,000.00
134040	"	Jan. 5-'93	Jan. 5-'93	Apr. 8-'93	5,000.00
134039	" ...	Jan. 5-'93	Jan. 5-'93	Apr. 8-'93	5,000.00
136000	" ...	Dec. 9-'92	Dec. 19-'92	Jun- 22-'93	5,000.00
136001	" ...	Dec. 10-'92	Dec. 8-'92	Jun- 11-'93	5,000.00
136002	"	Dec. 12-'92	Dec. 8-'92	Jun- 11-'93	5,000.00
136003	"	Dec. 10-'92	Dec. 8-'92	Jun- 11-'93	5,000.00
136008	"	Jan. 5-'93	Dec. 19-'92	Jun- 22-'93	5,000.00
136010	"	Jan. 6-'93	Dec. 2-'92	Jun- 6-'93	5,000.00
137002	"	Jan. 5-'93	Jan. 3-'93	Jul- 6-'93	5,000.00
137001	"	Jan. 5-'93	Jan. 3-'93	Jul- 6-'93	5,000.00
137003	"	Jan. 21-'93	Jan. 21-'93	Jul- 24-'93	5,000.00
134001	"	Oct. 17-'92	Oct. 1-'92	Apr. 18-'93	5,000.00
134013	"	Oct. 27-'92	Oct. 22-'92	Apr. 25-'93	5,000.00
135005	"	Nov. 30-'92	Nov. 26-'92	May 29-'93	5,000.00
133014	"	Oct. 19-'92	Sep. 22-'92	Mar. 25-'93	5,000.00
134003	" ..	Apr. 7-'92	Oct. 1-'93	Apr. 1-'93	5,000.00
131010	"	Jul- 26-'92	Jul- 25-'92	Jan. 28-'93	5,000.00
118004	"	Feb. 15-'92	Feb. 3-'92	Aug. 6-'92	5,000.00
131011	"	Jul- 26-'92	Jul- 25-'92	Jan. 28-'93	5,000.00
133003	"	Sep. 20-'92	Sep. 1-'92	Mar. 4-'93	5,000.00
133004	"	Sep. 20-'92	Sep. 6-'92	Mar. 9-'93	5,000.00

Now there are several notes which I am able to find upon the books of the bank, of the Western Manufacturing Company, which are in hands of the receiver. Which are shown on his books, and which are not shown upon the books of the bank. I have not been able to find that they were entered.

(COURT:) Can you state any of those?

A. I have not read any of those. I still have four others left. (Witness continues reading as foll-ws):

133002	"	Sep. 15-'92	Sep. 25-'92	Mar. 18-'93	5,000.00
133005	"	Sep. 29-'92	Sep. 15-'92	Mar. 18-'93	2,500.00
134005	"	Oct. 17-'92	Oct. 15-'92	Apr. 18-'93	5,000.00
133000	"	Sep. 9-'92	Sep. 6-'92	Mar. 9-'93	5,000.00

550 (COURT:)

Q. And the rest of them do not appear upon the books of the bank to have them counted within its assets?

A. Yes sir, they were rediscounted apparently, and turned up as rediscounts against the Receiver.

(COURT:) How many of them are there?

(DEWEESE:)

Q. How do you know they were discounted have you ever seen them?

A. I think I have seen some of them Mr. Deweese.

(Mr. DEWEESE:)

Q. You speak of having seen some of them, are they the ones that are here?

A. I think some of them are in that (indicating) bunch, if you have the bunch of notes.

(DEWEESE:)

Q. Will you give a list of them that are here?

A. I think all of the notes that I have on this list that I have not already read, but one, are here, this one I was unable to find any record of in the bank.

(Witness continues to read as follows:)

133881	" ...	Sep. 13-'92	Mar. 17-'93	....	5,000.00
136081	"	Jan. 15-'92	Jan. 13-'93	... .	5,000.00
135042	"	Jan. 10-'93	May 13-'93	....	5,000.00
133681	" ..	Sep. 13-'92	Mar. 13-'93	....	5,000.00
132105	" ...	Aug. 16-'92	Feb. 16-'93	....	5,000.00
141017	"	Aug. 29-'92	Mar. 4-'93	....	5,000.00
135003	" ...	Nov. 23-'92	May 23-'93	....	5,000.00
133041	"	Dec. 17-9-	Mar. 17-'93	....	2,500.00

551 Now that is all the notes I have here except the one note of $5,000.00 which shows upon the Receiver's books as having been filed as a claim a rediscount and the note was lost apparently.

(COURT:)

Q. And does not appear upon the books of the Capital National Bank as an asset?

A. Well I don't know as to that because I don't know the number of it, don't know anything about it.

Q. You may state what you find with reference to the lost note you speak of.

A. I find on the books of the Receiver the allowance of a claim for the lost note of the Western Manufacturing Company for $5,000.00.

Q. You don't have the number of that note you say?

A. No sir.

Q. And for that reason you cannot make an examination of the books?

A. No sir.

Q. Now you may state the total amount of notes of the Western Manufacturing Company to which you have testified, that the books, that is the books of the bank do not show, but which appear to have been issued and rediscounted by the bank and filed with the Receiver as a claim against the bank.

552 A. The total amount is $37,500.00.

Q. Does that include the lost note?

A. No sir.

Q. What is the total amount of all the notes to which you have testified, not including these rediscounts not shown upon the books and not including the lost note, I mean the notes of the Western Manufacturing Company which you have just testified.

A. The total of the notes shown on the Discount Register of the bank is $192,500.

The total of the notes which are attached to the deposition as rediscounts, but which are not shown upon the books of the bank is $37,500.00.

The lost note is $5,000.00 making a total of $235,000.00.

Q. These are what are classed as Western Manufacturing Company Notes?

553 A. Yes sir.

Q. Now you may state Mr. Whitmore if you have made an examination of the books of the Capital National Bank to ascertain if any interest was received by the bank on any of these notes to which you have testified as having been executed by C. W. Mosher, Edwin W. Mosher and the Western Manufacturing Company.

A. I have.

Q. You may state if the books of the bank show if any interest was received by the bank of any of the notes signed by C. W. Mosher to which you have testified, either when the notes were taken by the bank, or paid, or at any other time.

A. I have investigated the books as to the notes to which I have testified of C. W. Mosher, Edwin W. Mosher and the Western Manufacturing Company, and there is nothing on the books,—the books do not show that any interest was received at the time any of these notes were taken except in the case of note No. 135005 of the Western Manufacturing Company taken November 30" 1892 the books showing as to that note as receipt of $280.00 interest.

(Mr. DEWEESE:)

Q. What book is that shown in, some of the books of the bank?

554-560 A. Yes sir, there is a book called the "interest received" book.

* * * * * * *

561 Exhibit #1037 received and read in evidence as follows:

"Monday, June 21, '86. 571.

222. U. S. Nat. Bank. N. Y. $20,000.000.

Q. Calling your attention Mr. Whitmore to Exhibit No. 1037 I will ask you to explain what the entry U. S. Nat. Bank, N. Y. $20,000.00 indicates and signifies.

A. It indicates a charge against the United States National Bank of $20,000.00 on accounts of funds transferred from New York.

Q. Has that entry as shown on the Journal been transferred and posted on the account of the United States National Bank
562 of Omaha to the Ledger of the Capital National Bank?

A. Yes sir, it has been properly transferred to the Ledger account of the United States National Bank. It appears on Ledger "A" (Exhibit 11,) of the Capital National Bank on page 222 on the line bearing the number "21" in the left hand column.

Mr. THOMAS: We offer in evidence the line indicated and referred to by the witness, (Exhibit No. 1083).

The following entry received and read in evidence.

"222. U. S. Nat. Bank.

1886.

June 21, N. Y. 571 20,000.00."

Q. I will ask you if you have examined the books of the bank to ascertain if there was a corresponding charge on that day to New York or any bank in New York.

563 A. I have made such an examination.

Q. Give the result of that examination.

A. I find no corresponding charge against New York, or any New York bank, with which the Capital National Bank was then doing business, on that day.

564 Mr. THOMAS: We offer in evidence the following portion of the General Balance Book "A" of the Capital National Bank identified by the reporter and also by the Notary Mr. Ricketts as Exhibit No. 19, the column under date of Wednesday December 29th 1886, together with the corresponding titles of accounts in the left hand column of the same page, each of said columns being identified by the reporter as Exhibit No. 1039.

The columns offered are received and read in evidence, being as follows,—(Exhibit No. 1039).

565 1039 (25) Morning, Wednesday Dec. 29/36.

Capital Stock		300000 00
Surplus		12000 00
U. S. Bond ac	50000 00	
Premium ac	7188 43	
Circulation ac		45000 00
Redemption Fund	1900 00	
Stock & Bond ac	22739 34	
Furniture ac	5650 00	
B/R	725826 12	
Cash	55378 44	
Bills of Exchange	25458 45	
Commercial Nat'l Bank, Chic	27747 31	
U. S. National Bank Omaha	14011 93	
Omaha Nat'l Bank "	4628 78	
Merchants Nat'l Bank "	1911 83	
Commercial Nat'l Bank "		603 20
Chemical Nat'l Bank	46321 32	
Drovers Nat'l Bank	158 73	
Blackstone Nat'l Bank	4865 70	
American Exchange in Europe	66 46	
First Nat'l Bank Beatrice		5307 67
Merchants Nat'l Bank, Nebr. City		268 40
Bank of Cass County	47 15	
Schuster, Hax & Co	1500 73	
First Nat'l Bank, Kans. City	5179 87	
Walsh & Putnam	11600 00	
Hurbut, E. Jr	667 83	
Undivided profits		9 36
Rediscount		52090 60
Real Estate	1450 00	
Tax	77 33	
C. W. Marsh	521 65	
Discount, Interest & Ex		36644 92
Interest Paid	8214 90	
Wages	5149 98	
Expenses	3735 67	
Deposit ac		580073 80
	1031997 95	1031997 95

Not in over drafts Bank O. D. in..$11,665.87

566 Mr. THOMAS: We offer in evidence from the same book the column under date of Tuesday August 2nd 1887, also the column containing the title of accounts in the left hand column of the same page each of said columns being identified by the reporter as exhibits No. 1040.

* * * * * * *

The columns offered are received and read in evidence, (Exhibit No. 1040.)

567 1040 (26) Morning of Tuesday, Aug. 2/87.

Capital Stock		300000 00
Surplus		16000 00
U. S. Bond ac	50000 00	
Premium ac	6200 00	
Circulation ac		45000 00
Redemption Fund	2250 00	
Stock & Bond ac	15281 00	
Furniture ac	5650 00	
B/R	832941 44	
Cash	87631 50	
Bills of Exchange	42096 44	
Commercial Nat'l Bank, Chic	11998 98	
American Exch. Nat'l Bank	3048 07	
U. S. National Bank Omaha	12079 52	
Omaha Nat'l Bank "	6130 13	
Merchants Nat'l Bank "		948 75
Commercial Nat'l Bank "		2335 16
Chemical Nat'l Bank	28570 52	
Drovers Nat'l Bank	131 53	
Blackstone Nat'l Bank	240 97	
American Exchange in Europe	722 54	
First Nat'l Bank, Beatrice	639 48	
Merchants Nat'l Bank, Nebr. City	300 11	
Bank of Cass County	467 39	
Schuster, Hax & Co	3119 24	
First Nat'l Bank, Kans. City	1058 18	
South Omaha Nat'l Bank	1042 48	
Walsh & Putnam	10400 00	
Hurlbut, E. Jr.	442 83	
Undivided Profits		30 18
Real Estate	17874 32	
C. W. & W. W. Marsh	3008 35	
Discount, Int. & Exch		6799 24
Wages ac	1083 33	
Interest Paid ac	2835 72	
Expense "	1360 05	
Deposit "		777490 79
	1148604 12	1148604 12

Not in Country Bank over-drafts..	3435.07	
Ind. Overdrafts	53828.74	
Total over-drafts	**57263.81**	

568 Mr. THOMAS: We offer in evidence from the same book the column under date of Thursday October 6th 1887, also the column containing the titles of accounts in the left hand column, of same page, each of said columns being identified by the reporter as Exhibits No. 1041.

The columns offered are received and read in evidence, as follows, **(Exhibit No. 1041.)**

569 1041 (27) Morning of Thursday, Oct. 6/87.

Capital Stock		.....	300000
Surplus		.....	16000
U. S. Bond ac		50000 0–	
Premium ac		5500	
Circulation		.....	45000
Redemption Fund		2250	
Stock & Bond ac		16129 55	
Furniture ac		5650	
B/R	867.30 / 786663.70	787531 50	
Cash		104617 55	
Bills of Exchange		42458 65	
Chemical Nat'l Bank		7496 58	
American Exch. Nat'l Bank		21742 29	
Commercial Nat'l Bank, Omaha		114 90	
U. S. Nat'l Bank "		21724 78	
Omaha Nat'l Bank "		4078 88	
Merchants Nat'l Bank "		453 19	
First Nat'l Bank Kans. City		922 94	
Schuster, Hax & Co.		816 45	
D-overs Nat'l Bank		.....	1071 07
Blackstone Nat'l Bank		3590 67	
American Exchange in Europe		1268 86	
South Omaha Nat'l Bank		1478 28	
Merchants Nat'l Bank, Nebr. City		468 53	
First Nat'l Bank Beatrice		.....	1997 55
Bank of Cass County		.....	323 29
Commercial Nat'l Bank, Chic		491 17	
Clearing House ac		.....	4159 04
Walsh & Putnam		10000	
Hurlbut, E. Jr.		442 83	
Undivided Profits		.....	30 18
Rediscount ac		.....	10000
Real Estate ac		15888 82	
C. W. & W. W. Marsh		2974 19	
Discount, Int. & Exch		....	19306 82
Wages ac		3249 99	
Interest Paid ac		9474 22	
Expense ac		2503 48	
Deposit ac		.....	725430 36
(Not in) Country Bank over-drafts	3977.13	1223318 31	1223318 31
Overdrafts	19393.52		
Total over-drafts	23370.65		

570 Mr. THOMAS: We offer in evidence from General Balance Book "B" of the Capital National Bank, the same being identified by the reporter and also by the Notary Mr. Ricketts, the column under date of December 14th, '88, also the column contain-

ing the titles of accounts in the left hand column of same page, each of which are identified by the reporter as Exhibit No. 1042.

The columns offered received and read in evidence as follows, (Exhibit No. 1042.)

571 (28) Friday, Dec. 14, 1888.

Capital Stock	.....	300000
Surplus	.....	20000
U. S. Bonds	50000	
Premium ac	4000	
Circulation ac	.....	54000
Redemption Fund	1730	
Stock and Bond ac	9148 88	
Furniture	5650	
B / R	824864 18	
Cash	71448 91	
Bills of Exchange	32986 83	
Chemical Nat'l Bank	33453 11	
American Exch. Nat'l Bank	10158 06	
Commercial Nat'l Bank Omaha	.....	3510 39
U. S. Nat'l Bank "	9330 28	
Omaha Nat'l Bank "	5943 97	
Merchants Nat'l Bank "	.....	2242 34
First Nat'l Bank Kansas City	2045 03	
Schuster, Hax & Co	321 63	
Drovers Nat'l Bank	49 29	
Blackstone Nat'l Bank	951 22	
American Exchange in Europe	725 40	
South Omaha Nat'l Bank	684 43	
Merchants Nat'l Bank, Nebr. City	524 14	
First Nat'l Bank, Beatrice	.....	958 09
Bank of Cass County	39 86	
Commercial Nat'l Bank Chic	3303 97	
Knauth, Nachod and Kuhud	254 80	
Walsh & Putnam	8500	
Undivided Profits	.....	305 12
Discount ac	.....	121180 43
Real Estate ac	22608 03	
C. W. and W. W. Marsh, Coll,	4752 21	
Discount, Interest and Exch	.....	37373 34
Wages ac	7769 93	
Suspense ac	18 35	
Interest Paid ac	10445 34	
Expense ac	2890 57	
Deposit ac	.....	594028 71
	1124598 42	1124598 42

Over Drafts.

Country Banks	3001.12
Individual	$50524.22
Total	$53525.34

572 Mr. THOMAS: We offer in evidence from the same book column under date Tuesday October 1st, 1889, also the column containined the title of accounts in the left hand column of same page, each of said columns being identified by the reporter as Exhibit No. 1043.

The column offered is received and read in evidence as follows, (Exhibit No. 1043.)

573 1043 (29) Morning of Tuesday, Oct. 1/89.

Capital Stock	.....	300000
Surplus ac	.....	24000
U. S. Bond ac	50000	
Premium "	3750	
Circulation "	.....	45000
Redemption Fund	1500 00	
Stock & Bond ac	21954 94	
Furniture "	5770	
B/R	761156 53	
Cash	65054 70	
Bills of Exchange	36665 78	
Chemical Nat. Bank	1550 94	
Am. Exch. Nat. Bank	14996 55	
Com'l Nat. Bank, Omaha	540 89	
U. S. Nat. Bank, "	13690 85	
South Omaha Nat. B'k	442 19	
First Nat. B'k, Kan. City	731 31	
Schuster, Hax Nat'l Bank	413 38	
Drovers Nat. Bank	59 04	
Blackstone Nat. Bank	1487 80	
Am. Exch. in Europe	725 40	
Merchants Nat. Bank, Neb. City	338 51	
First Nat. Bank, Beatrice	.....	2900 20
Bank of Cass County	153 36	
Com'l Nat. Bank, Chicago	746 22	
Knauth, Nachod & Kuhne	26 09	
Clearing House ac	.....	12597 50
Walsh & Putnam	8500	
Undivided Profits	.....	598 38
Rediscount ac	.....	15682 92
Real estate ac	37976 70	
C. W. & W. W. Marsh, Coll's	4969 65	
Discount Int. & Exchange	.....	16508 99
Wages, ac	4453 32	
Suspense ac	9 20	
Interest Paid ac	2895 64	
Expense "	3473 06	
Deposit "	.....	626744 06
	1044032 05	1044032 05

Not in Country Bank over-drafts.	5390.35
Overdrafts	31906.15
Total overdrafts	37296.50

574 Mr. THOMAS: We offer in evidence from the same book column under date of Thursday, December 12, 1889, also column containing titles of accounts in the left hand column of same page, each of said columns being marked Exhibit No. 1044.

The columns offered received and read in evidence as follows,—(Exhibit No. 1044.)

575 1044 (30) Morning of Thursday, Dec. 12/89.

Capital Stock	... .	300000
Surplus ac	.....	24000 00
U. S. Bond ac	50000	
Premium "	3750	
Circulation "	.....	45000
Redemption Fund	1709 41	
Stock and Bond ac	11954 94	
Furniture	5770	
B / R	742485 61	
Cash	38643 31	
Bills of Exchange	32036 78	
Chemical Nat. Bank	22379 67	
Am. Exch. Nat. Bank	10047 26	
Com'l Nat. Bank, Omaha	.....	1721 92
U. S. Nat. Bank, "	2656 98	
South Omaha Nat. Bank	.....	402 58
First Nat. Bank, Kans. City	1211 18	
Schuster Hax Nat. Bank	252 17	
Blackstone Nat. Bank	461 45	
American Exchange in Europe	725 40	
Merchants Nat. Bank, Neb. City	246 45	
First Nat. Bank, Beatrice	.....	3517 07
Bank of Cass County	13 40	
Com'l Nat. Bank, Chic	288 39	
Knauth, Nachod & Kuhne	.....	24 08
Clearing House ac	.....	
Walsh & Putnam	8500 00	
Undivided Profits	.....	598 38
Rediscount ac	.....	138103 49
Real Estate "	41565 47	
C. W. & W. W. Marsh, Coll's	4969 65	
Discount, Int. & Exchange	.....	32807 20
Wages ac	6699 98	
Suspense ac	.....	17 38
Interest Paid ac	9559 91	
Expense "	4259 91	
Deposit "	.....	453995 22
	1000187 32	1000187 32

Not in Country Bank overdrafts.	8,545.14
Overdrafts	46,975.68
Total over-drafts	55,520.82

576 Mr. THOMAS: The plaintiffs offer in evidence from the same book the column under date of Friday, October 3, 1890, together with the column at the left on same page containing titles of accounts, each of said columns being identified by the reporter as Exhibit No. 1045.

* * * * * * *

The columns offered, received and read in evidence, as follows,—(Exhibit No. 1045.)

577 1045 (31) Morning of Friday, Oct. 3 / 90.

Capital Stock	.....	300000
Surplus ac	.....	28000
U. S. Bond ac	50000	
Premium "	2687 50	
Circulation "	.....	45000
Redemption Fund	2250 00	
Stock & Bond ac	6909 88	
Furniture "	5770	
B / R	846174 42	
Cash	98687 07	
Bills of Exchange	30133 69	
Chemical Nat. Bank	10885 84	
Am. Exch. Nat. Bank	29907 13	
Com'l Nat. Bank, Omaha	6969 85	
U. S. Nat. Bank, "	28857 54	
South Omaha Nat. Bank	1741 21	
First Nat. Bank, Kans. City	805 61	
Schuster Hax Nat. Bank	550 48	
Blackstone Nat. Bank	803 33	
Am. Exch. in Europe	725 40	
Merchants' Nat. Bank, Neb. City	.....	13772 20
First Nat. Bank Beatrice	1418 99	
Bank of Cass County	.....	493 50
Com'l Nat. Bank, Chicago	1813	
Knauth, Nachod & Kuhne	195 82	
Clearing House ac	.....	
Walsh & Putnam	5600	
Undivided Profits	.....	500 19
Rediscount ac	.....	82375 00
Real Estate ac	54401 59	
Discount, Interest & Exch	.....	14827 21
Wages ac	4537 07	
Expense "	38 10	
Taxes paid ac	2000	
Interest paid "	2683 09	
Expense "	1769 42	
Deposit "	.....	713347 93
	1198316 03	1198316 03

Not in Country Bank overdrafts.. 4,824.66
Overdrafts..... 51,401.96

Total overdrafts..... 56,226.62

578 Mr. THOMAS: We offer in evidence from the same book the entry or column under date of Saturday December 20, 1890, together with the column at the left of the same page containing the titles of accounts, each of said columns being identified by the reporter as Exhibit No. 1046.

The columns offered are received and read in evidence, as follows,—(Exhibit No. 1046.)

579 1046 (32) Morning of Saturday, Dec. 20 / 90.

Capital Stock		300000
Surplus ac		28000
U. S. Bond ac	50000	
Premium "	2400	
Circulation "		45000
Redemption Fund	2250 00	
Stock & Bond ac	6909 88	
Furniture "	5770	
B / R	823829 70	
Cash	63326 82	
Bills of Exchange	39424 90	
Chemical Nat. Bank	20866 95	
Am. Exch. Nat. Bank	16448 84	
Com'l Nat. Bank Omaha	5503 53	
U. S. Nat. Bank "	15020 70	
South Omaha Nat. Bank	849 93	
First Nat. Bank, Kans. City	570 21	
Schuster Hax Nat. Bank	4108 32	
Blackstone Nat. Bank	231 58	
Am. Exchange in Europe	725 40	
Merchants' Nat. Bank, Neb. City	1035 49	
First Nat. Bank Beatrice		313 64
Bank of Cass County		98 23
Com'l Nat. Bank, Chicago	675 08	
Knauth, Nachod & Kuhne	153 82	
Clearing House ac		6887 02
Walsh & Putnam	5600 00	
Undivided Profits		500 19
Discount ac		43676 25
Real Estate ac	55099 59	
Discount, Int. & Exch		33085 61
Wages ac	6750 23	
Suspense "	9 26	
Taxes Paid ac	2000	
Interest Paid ac	14769 98	
Expense "	2775 51	
Deposit "		689544 78
	1147105 72	1147105 72

Not in Country Bank overdrafts..	6608.94
Overdrafts	27342.90
Total overdrafts	33951.84

580 Mr. THOMAS: The plaintiffs offer in evidence from the same book, the column under date of Friday July 10, 1891, together with the column at the left of the same page containing the titles of accounts each of said columns being marked by the reporter as Exhibit No. 1047.

The columns offered are received and read in evidence as follows,—(Exhibit No. 1047.)

581 1047 (33) Mor-ing of Friday, July 10/91.

Capital Stock		30000
Surplus ac		30000
U. S. Bond ac	50000	
Premium "	1437 50	
Circulation "		45000
Redemption Fund	600 00	
Stock & Bond ac	52913 49	
Furniture "	5770	
B/R	801780 97	
Cash	67398 46	
Bills of Exchange	9332 75	
Chemical Nat. Bank		27672 60
Am. Exch. Nat. Bank		4109 81
Com'l Nat. Bank, Omaha		13123 61
U. S. Nat. Bank, "	1984 76	
South Omaha Nat. Bank	1963 93	
First Nat. Bank Kansas City	52 15	
Schuster Hax Nat. Bank	619 72	
Blackstone Nat. Bank	177 74	
Am. Exch. in Europe	725 40	
Merchants Nat. Bank	1024 96	
First Nat. Bank Beatrice		3999 39
Bank of Cass County		36 32
Knauth, Nachod & Kuhne	80 04	
Clearing House ac		3229 16
Walsh & Putnam	2800	
Undivided Profits		16003 79
Rediscount ac		117391 10
Real Estate "	56230 60	
Taxes Paid "	1500 00	
Discount Int. & Exch		1301 08
Wages ac	1068 33	
Suspense	105 06	
Interest Paid	733 77	
Expense ac	408 14	
Deposit "		496840 91
	1058707 77	1058707 77

Not in Country Bank overdrafts..	10050.26
Overdrafts	52834.98
Total overdrafts	62885.24

582 Mr. THOMAS: We offer in evidence from the same book, the column under date of Saturday September 26th, 1891 together with the column at the left of the same page, containing the titles of accounts each of said columns being marked by the reporter as Exhibit No. 1038.

The columns offered are received and read in evidence as follows,—(Exhibit No. 1048.)

583 1048 (34) Morning of Saturday, Sept. 26/91.

Capital Stock	.....	300000
Surplus ac	.....	32000
U. S. Bond ac	50000	
Premium "	868 82	
Circulation ac	.....	45000
Redemption Fund	2250	
Stock and Bond ac	53063 49	
Furniture "	5770 00	
B/R	765133 40	
Cash	59451 46	
Bills Exchange	10794 09	
Chemical Nat. Bank	18442 41	
Amer. Exch. Nat. Bank	8263 27	
Com'l Nat. Bank, Omaha	.....	286 61
U. S. National Bank "	14908 97	
So. Omaha Nat. Bank	43	
First Nat. Bank, Kans. City	380 06	
Schuster Hax Nat. Bank	288 88	
Blackstone Nat. Bank	620 48	
Amer. Exch. in Europe	725 40	
Merchants' Nat. Bank, Nebr. City	.....	416
First National Bank, Beatrice	2458 92	
Bank of Cass Co	.....	66 32
Knauth, Nachod and Kuhne	169 01	
Clearing House ac	.....	3914 82
Walsh & Putnam	2800	
Undivided Profits	.....	253 79
Rediscount ac	.....	198571 52
Real Estate "	56478 20	
Taxes Paid	1500 00	
Dis. Int. and Exch	.....	14531 78
Wages ac	3239	
Suspense ac	127 83	
Int. Paid "	3495 40	
Expense "	2423 92	
Deposit "	.....	473112 60
Continental Nat. Bank	4500 00	
	1068153 44	1068153 44

Not in Country Bk. overdrafts...	9521.76
Indiv. overdrafts	16778.51
Total overdrafts	**26300.27**

584 Mr. THOMAS: We offer in evidence the following portion of General Balance Book "C" of the Capital National Bank, the same being identified by the reporter and also by the Notary as Exhibit No. 21 the column under date of Thursday December 3/91 also the column containing the titles of the accounts in the left hand column of the same page, each of said columns being identified as Exhibit No. 1049.

Exhibit No. 1049 is received and read in evidence as follows,—

585 1049 (35) Morning of Thursday, Dec. 3/91.

Capital Stock		300000
Surplus ac		32000
U. S. Bond ac	50000	
Premium ac	868 82	
Circulation ac		45000
Redemption Fund	2250 00	
Stock & Bond ac	53511 49	
Furniture	5770	
B/R	735474 93	
Cash	44314 02	
Bills of Exchange	10583 88	
Chemical Nat. Bank	402 45	
Am. Exch. Nat. Bank	16673 83	
U. S. Nat. Bank	7605 55	
South Omaha Nat. Bank	1510 24	
First Nat. Bank, Kans. City	224 55	
Shuster Hax Nat. Bank	1588 07	
Blackstone Nat. Bank	1034 78	
Am. Exch. in Europe	725 40	
Merchants Nat. Bank N. C.		604 46
First Nat. Bank Beatrice	224 28	
Bank of Cass County		3 17
Knauth Nachod & Kuhne	193 08	
Continental Nat. Bank Boston	5155 00	
Clearing House ac		
Walsh & Putnam	2800 00	
Undivided Profits		253 79
Rediscount ac		125196 14
Real estate "	56572 70	
Taxes Paid "	2512 50	
Discount Interest & Exchange		23023 10
Wages ac	6530 83	
Suspense "	46 43	
Interest Paid ac	14792 48	
Expense "	3792 17	
Deposit "		499078 82
	1025159 48	1025159 48

Not in Country Bank overdrafts	7415.11
Overdrafts	41372.29
Total overdrafts	48787.40

586 Mr. THOMAS: We offer in evidence from the same book the column under date of Saturday December 10, 1892, together with the column at the left hand of the same page containing the titles of accounts each of said columns being marked Exhibit No. 1050.

Exhibit No. 1050 is received and read in evidence as follows:—

587 1050 (36) Saturday, Dec. 10/92.

Capital Stock	.....	300000
Surplus ac	.....	6000
U. S. Bond ac	50000	
Circulation "	.....	45000
Redemption Fund	1350	
Stock and Bond ac	325	
Furniture	5770	
B/R	687696 01	
Cash	44848 45	
Bills of Exchange	2591 31	
Chemical Nat'l Bank	41924 17	
Am. Exch. Nat'l Bank	4513 70	
U. S. Nat'l Bank, Omaha	29880 78	
South Omaha Nat'l —	858 03	
Packers' Nat'l Bank	194 27	
First Nat'l Bank, Kansas City	719 15	
Schuster, Hax Nat'l Bank	808	
Blackstone Nat'l Bank	389 57	
Merchant's Nat'l Bank	1038 74	
First Nat'l Bank, Beatrice	1264 27	
Bank of Cass County	.....	1 74
Knouth, Nachod & Kuhne	237 62	
Clearing House ac		
Walsh & Putnam	2800	
Undivided Profits	.....	26 81
Rediscount ac	.....	34054 38
Real Estate	110352 04	
Discount, Interest and Exchange	.....	19905 68
Wages ac	7159 98	
Suspense ac	.....	1432
Interest Paid ac	1356 25	
Expense "	5872 93	
Deposit "	.....	605529 66
	1011950 27	1011950 27

* 2580.45
16812.50

19392.95

[* In pencil in copy.]

588 & 589 Q. I will ask you if you have seen the published statements of the assets and liabilities of the Capital National Bank, that have been introduced in this case?

A. I have.

* * * * * * *

590 By Mr. THOMAS:

Q. Now I will ask you to state if you have compared those published statements with those dates on the General Balance book, to ascertain if they agree, that is if the published statement agrees with the condition of the bank as shown by the General Balance book of that date, of that day's business?

A. I have.

Q. I will ask you to state if they agree?

591 A. They do not agree in all respects.

Q. Referring particularly to the condition of the bank as shown in the general balance book under date of December 29" 1886 Exhibit No. 1093, and comparing that with the published statement of the condition of the bank at the close of the day previous, you may state what discrepancies or variations there are between the General Balance Book, and the Published statement.

A. The loans as published were $11600.00 more than shown on the Balance Book. The amount due from all Banks is $34,339.47 more than is shown by the General Balance books. Bills of Exchange to the amount of $25,458.45 are not identified or shown in the published statement. And real estate to the amount of $1450.00 is not shown in the Published statement.

* * * * * * *

592 Q. You may state what discrepancies if any you find in the condition of the bank as shown by the General Balance book under date of August 2nd, 1887 and the published statement of the condition of the bank of that day, or the day preceding.

593 A. I will answer that question by giving the correct date, at the close of business on a certain day. The published statement of the condition of the bank at the close of business on August 1" 1887 shows loans $75,681.97 more than is shown on the General Balance book. The published statement shows $53,313.71 more due from all banks than is shown by the General Balance book. The published statement shows $17,874.32 less real estate than is shown by the General Balance book. The published statement shows $10,462.98 more cash than is shown by the General Balance book. The published statement does not show as such Bills of Exchange account, amounting to $42,096.44.

The published statement shows $51,032.12 less overdrafts than are shown by the Individual Balance Books at that time.

Q. Now you may state what discrepancies you find if any, between the condition of the bank as shown by the books and the published statement at the close of business October 5" 1887.

594 A. The published statement shows $44,658.83 more loans than are shown on the General Balance book.

The published statement shows $60,435.78 more due from all banks than is shown by the General Balance book.

The published statement shows $14,438.82 less real estate than is shown by the General Balance Book.

The published statement does not show, as such, the Bills of Exchange Account, which amounted to $42,458.65.

The published statement shows $20,780.12 less overdrafts than were shown by the Individual Balance book.

Q. You may state what discrepancies, you find, if any, between the published statement of the condition of the bank at the close of business December 12th, 1888 and the condition of the bank as disclosed by the books of the bank.

A. The published statement shows $36,080.00 more loans than are shown on the General Balance Book.

The published statement shows $64,975.68 more due from all banks than is shown by the General Balance book.

The published statement shows $10,000.00 less notes and Bills discounted than is shown on the General Balance book.

The bills of Exchange account amounting to $32,986.83 is not shown as such on the published statement.

The published statement shows $41,991.16 less overdrafts than are shown by the Individual balance book.

Q. You may state what discrepancies you find, if any, between the condition of the bank at the close of business September 30" 1889 as shown by the published report and as disclosed by the books of the bank?

595 A. The published statement shows $39,003.35 more loans than is shown by the General Balance book.

The published statement shows $89,059.13 more due from all banks than is shown on the General Balance book.

The published statement shows $46,000.00 more notes and Bills discounted than the General Balance book shows.

The Bills of Exchange account amounting to $36,665.78 is not shown as such in the published statement.

The published statement shows overdrafts $30,924.05 less than the Individual Balance book.

Q. You may state what discrepancies you find, if any, between the condition of the bank at the close of business December 11th 1889 as disclosed by the published statement, and as disclosed by the books of the bank.

596 A. The published statement shows $66,295.47 more loans than the General Balance book.

The published statement shows $44,809.47 more due from all banks than the General Balance book.

The published statement shows $18,735.55 more cash than the General Balance book.

The published statement shows $12,081.25 more rediscounts than the General Balance book.

The Bills of Exchange account, amounting to $32,036.78 is not shown as such in the published statement.

The published statement shows $44,543.70 less overdrafts than the Individual Balance book.

Q. You may state what discrepancies you find, if any, between the condition of the bank at the close of business December 19th 1890 as shown by the published statement, and as shown by the books of the bank.

597 A. The published statement shows $23,612.70 more loans than the General Balance book.

The published statement shows $79,007.16 more due from all banks than the General Balance book.

The published statement shows $20,000.00 more cash than the General Balance book.

The published statement shows $52,973.32 more rediscounts than the General Balance book.

The bills of Exchange account amounting to $39,424.90 does not appear as such in the published statement.

The published statement shows $24,621.64 less overdrafts than the Individual Balance book.

Q. You may state what discrepancies you find, if any, in the condition of the bank at the close of business July 9" 1891 as shown by the published statement, and as disclosed by the books of the bank.

A. The published statement shows $96,230.60 more loans than the General Balance book.

The published statement shows $72,183.01 more due from all banks than the General Balance Book.

598 The Bills of Exchange account $9,332.75 is not shown as such in the published statement.

The published statement shows real estate $56,230.60 less than is shown on the General Balance book.

The published statement shows $50,050.26 less overdrafts than is shown on the Individual Balance book.

Q. You may state what discrepancies you find, if any, in the condition of the bank at the close of business September 25th, 1891 as shown by the published report and as disclosed by the books of the bank.

A. The published report shows loans $69,006.06 more than the General Balance book.

The published report shows $31,723.67 more due from all banks than the General Balance book.

The published report shows $100,000.00 less rediscounts than is shown by the General Balance book.

The published report shows $56,478.20 less real estate than is shown by the General Balance books.

599 The Bills of Exchange account amounting to $10,794.09 is not shown as such in the published statement.

The published statement shows $22,049.62 less overdrafts than is shown by the Individual Balance book.

Q. You may state what discrepancies you find, if any, between the business of the bank at the close of business December 2nd, 1891

as shown by the published statement, and as disclosed by the books of the bank.

A. The published statement shows $134,780.79 more loans than the General Balance book.

The published statement shows $36,460.29 more due from all banks than the General Balance Book.

The published report shows $30,000.00 more cash than is shown by the General Balance book.

The published statement shows $56,572.70 less real estate than is shown by the General Balance book.

The Bills of Exchange account amounting to $10,583.80 does not appear in the published statement as such.

The published statement shows $45,623.20 less over-
600–654 drafts than are shown by the individual Balance book.

Q. Are those all the comparisons you have made up to this time, between the published statements and the books of the bank?

A. Yes, sir. I would like to have the jury understand that these discrepancies which I have testified to, I don't pretend in my testimony to give all of the discrepancies that existed.

Mr. NORVAL: But these do exist.

A. Yes sir.

Q. And others that you haven't testified to.

A. Yes.

Q. Are you able at this time to testify to other discrepancies that you say exist between the published reports and the books of the bank?

A. I have made no memorandum of other discrepancies.

* * * * * * *

655–678 Q. I call your attention to certificate No. 24452 for $100,250.00. You have testified concerning that certificate in connection with the Relief Fund of which C. W. Mosher was Treasurer. And I believe you stated that the amount of it was entered on the books in open account to the credit of the Nebraska Relief Fund, is that correct?

A. I stated that a like amount was on that day credited to the account of the Relief fund.

Q. Yes, the same amount. And that a certificate of deposit was issued for that same amount on that same day was it?

A. Yes, sir.

Q. Do you find that there is anything wrong about that?

A. Why nothing wrong if the bank received the two deposits.

Q. Well was the certificate ever negotiated, or went into any body's hands, or had to be paid in any way?

A. Why it was paid by the bank.

Q. How do you know?

A. The books show it.

679 Further direct examination.

By Mr. THOMAS:

Q. I will ask you if you have made an examination of the books of the bank showing its condition at the close of business October 2nd, 1890, and compared it with the published statement of that day's business?

A. Yes sir.

Q. You may state what discrepancies if any, you find, between the condition of the bank and this statement.

A. The published statement shows $24,621.64 less overdraft than the individual balance book.

The published statement shows $23,612.70 more loans than the General Balance book.

The published statement shows $20,000.00 more cahs than the General Balance book.

The published statement shows $52,973.23 more rediscounts
680 than the general balance book.

The published statement shows $79,007.16 more due from all banks than the General balance book. The Bills of Exchange account amounting to $39,424.90 is not shown in the published statement.

Q. Have you made a similar comparison for any other date?

A. Yes sir, for the close of business December 9th, 1892.

Q. With the published statement including that day's business?

A. Yes sir.

Q. You may state what discrepancies you find, if any.

A. Well some of the discrepancies are,

The published statements shows $80,905.43 more loans than the General Balance book. The published statement shows $14,907.05 less overdrafts than the individual balance book.

The published statement shows $46,356.76 more due from all banks than the general balance book.

The published statement shows $14,565.48 more cash than the general balance book.

681 The published statement shows $71,734.12 less real estate than the general balance book.

The published statement shows $25,000.00 more rediscounts than the general balance book.

Bills of Exchange account amounting to $2,391.31 is not shown in the published statement.

Q. I will ask you if you have made an examination of the books of the bank to ascertain what notes were on hand at the time of the failure, or prior thereto, that were executed by the Marsh Harvester Company, or the Marsh Binder Manufacturing Company or the Sycamore-Marsh Harvester Company, C. W. or W. W. Marsh, C. E. Tuerk, or any of the various Marsh Companies.

A. I have made such an examination.

Q. You may state the result of that investigation, that is what the books show in regard to notes executed by these various companies or individuals, purporting to have been given to the bank by these

various companies or persons, and to have been entered upon the bank's books as a part of its Bills Receivable.

682 A. Do you want a history of the notes that have been given or do you want a list of the notes that were in the bank when the bank closed?

Q. You may state first what notes of these parties were in the banks as a part of its normal assets at the time the bank closed.

A.	No. 122010 Sycamore Marsh Harvester Co.....	4500.00
	No. 122011 C. W. & W. W. Marsh.....	3600.00
	No. 122012 Marsh Binder Manufacturing Co....	9000.00
	No. 122015 C. E. Tuerk.....	7289.10
	No. 102047 Marsh & Hinds.....	1000.00
	Total	25389.10

Q. Now have you traced these notes, the notes given by these parties back to a date prior to this to ascertain how long they or the renewals thereof had been in the bank, or the notes for which the renewals were given?

A. I have.

683 Q. You may state the result of that investigation.

A. No. 122010 Sycamore Marsh Harvester Co., $4500.00 started July 25th, 1887 as No. 33213 for $8,000.00. It was renewed at various times, and the amount reduced until the 5th of July 1892.

Q. And do the books during any of this period indicate, or show that any interest was ever paid on this note?

684 A. I have not been able to investigate as to *htat*, on all of the dates. I don't think I have investigated that at all as to this note.

No. 122011 C. W. & W. W. Marsh $3600.00 began July 25th, 1887 as No. 32439 C. W. & W. W. Marsh $3600.00. And it was renewed from time to time down until July 5th, 1892.

Mr. WHEDON: Nothing was paid on that?

A. No sir.

No. 122012 Marsh Binder Manufacturing Company $9,000.00 began on July 28th, 1888 as No. 34308 afterwards changed to No. 31291 and the amount originally was $9000.00. That was renewed at various times, but no change was made in the amount and the last renewal was July 5th, 1892.

No. 122015 C. E. Tuerk, $7289.10 began in the Marsh National Bank on May 28th 1884 as number 5664 a- $3225.67, every time this note was paid a renewal note for an additional amount was put in the bank, and I have examined in some instances and found that the difference was put into the interest received account, so that each time this note was renewed, the interest was added in for a certain amount, until the last renewal July 22nd, 1892 when it was made $7,289.10.

No. 102047 Marsh & Hinds $1000.00. This is a renewal of another note for the same amount but I didn't have time this morning

to trace it back any further than one renewal, and I haven't the memorandum here to show what that number is.

Q. Is that all that you have been able to trace back, that you have had time to trace back?

A. No, I have some of the Mosher notes.

Q. You may go ahead and state if you have made similar investigations in regard to notes held by the bank at the time of
685 its failure that were executed by Charles W. Mosher, or Edwin W. Mosher?

A. Yes sir.

Q. You may state the result of that investigation, in the same manner as you have in reference to the Marsh paper.

686 A. The W. C. Mosher paper in the bank at the time of the failure was note No. 50632 for $10,000.00. That began on the date it was taken into the bank. I don't find that it is a renewal of any other note, on October 27th, 1892.

No. 50637, $5,000.00 was taken December 20th, 1892 and it does not seem to be a renewal of any other note.

No. 50644, $5,000.00 was taken December 31st, 1892 and it does not seem to be a renewal of any other note.

No. 50642, $20,000.00 and #50643 for $20,833.34 were taken December 28th, 1892 and do not appear to be renewals.

No. 50638, -17,500.00 was taken December 24th, 1892 and does not appear to have been a renewal.

No. 50633, $5,000.00 was taken October 27th, 1892 and does not appear to be a renewal.

No. 132000, for $1948.33 is a note of C. W. Mosher and H. M. Bushnell, and is a renewal of #114001 taken October 7th, 1891 for $1256.81 and that note appears to be a renewal of a note marked on the "Bill book" as showing the bills that were taken and paid on each day under date of October 7th, 1891 as number 99173 Mosher & Outcalt for $406.14 and No. 100081 for $790.83.

These two notes were paid on the day that this No. 114001 for $1256.81 was given. I am unable to find this 99173 on the discount register, so I don't know when that $406.14 was taken.

The total of the C. W. Mosher paper is $85,281.67.

Q. And can you give the note of E. W. Mosher?

A. The E. W. Mosher paper I think I gave a list of it the other day.

No. 131000 for $5,000.00 began March 14th, 1892.

No. 131001 for $5000.00 began March 14th, 1892.

No. 131002 for $5,000.00 began March 14th, 1892.

687 No. 131003 for $5,000.00 began March 14th, 1892. There were four $5,000.00 notes began on the same day apparently.

No. 134007, for $12,730.00 apparently began on August 28th, 1890.

No. 134008 for $10,600 began apparently on August 28th, 1890.

No. 134009 for $8,611.20 apparently began November 25th, 1889.

No. 134010 for $5,000.00 apparently began October 17th, 1891.

No. 134011, for $5,000.00 apparently began September 3rd, 1891.

No. 136005 for $2500.00 apparently began December 27th, 1892.

No. %101 for $5,903.77, No. 50102, $5505.69; No. 50103, $5623.70 50104, $4307.28; No. 50105 for $3968.25 #50106 for $6,000.00 No. 50108 for $6881.18 and No. 50109 for $5963.86, all these numbers beginning with 50101 are renewals of notes that were taken on October 11th, 1888. They are renewals of a number of notes which were paid October 11th, 1888. I have a list of the notes here, but I didn't have time to trace them back to see when these notes that were paid October 11th, 1888 were taken into the bank. Some of them are identical in amounts with some of the notes I have given here. They are similar in amounts but there are more notes than the notes I have listed, that is more in number. But these notes that I have listed originated sometime prior to October 11th, 1888. The total amount is $106594.92.

Q. Did you examine the books of the bank to ascertain if any interest was received on any of these notes, either at the time they were taken, or marked paid, or at any other time?

A. As to the notes that were in the bank at the time of the failure of E. W. Moshers, I have examined the books as to each one of those.

Q. Now you may state what you found as to the notes C. W. or E. W. Mosher, that you say you have examined concerning.

688 A. I examined as to the notes of C. W. Mosher, that were in the bank at the time of the failure, and I did not find that there was any interest entered on account of any of these notes at the time they were put upon the books.

Q. Have you up to this time examined the notes of the several Marsh companies or individuals that were in the bank at the time of its failure to ascertain if there was any interest paid on them?

A. I have already answered that, I have no schedule of the Marsh notes that were in the bank. I don't remember whether I looked that up or not, that is those that were in the bank when the bank failed.

Q. Have you examined the books to ascertain the notes of the Western Manufacturing company executed by E. Hurlbert, Jr., Manager, that passed through the Capital National Bank up

689 to the time of its failure, and prior to that for any length of time.

A. I have for some time.

Q. How far back have you checked it this time?

A. I have checked notes as far back as July 25th, 1888, taken July 25th, 1888, but I haven't checked prior to that time. And I don't know that I have all of the notes that were taken after July 25th, 1888.

Q. You may state the total amount of Western Manufacturing Company notes which entered into the Bills Received and assets of the Capital National Bank since July 25th, 1888, that you have checked and verified at this time.

A. $755,000.00.

Q. Have you examined the books of the bank to ascertain whether at the time any of the notes included in this list referred to were

taken, or marked paid by the bank, if any interest was received by the bank on any of these notes?

A. I have made such an examination.

690 Q. You may state the result of that examination.

A. On October 2nd, 1890 there is an item of $208.35 interest received apparently on account of Western Manufacturing Company note. On August 28th, 1891 there is an item of $122.00 interest received on account of notes of the Western Manufacturing Company. On May 16th, 1892 there is an item apparently interest on a Western Manufacturing Company note of $170.80. On November 30th, 1892 there is an item of $280.00 interest received apparently for Western Manufacturing Company note. On December 30th, 1892 there is an item of $1250.00 interest received apparently on account of Western Manufacturing Company note. The item of October 2nd, 1890, $208.35 as credited to Interest account, the same item was charged that day to the Western Manufacturing Co., account on the Individual Balance Book. The other credits of $122.00, $170.84; $280.00 and $1250.00 do not appear to have been charged to the Western Manufacturing Company's deposit account, but they are in the interest account as interest received. Now all of these Western Manufacturing Company

691 notes that I have examined, that are in this list are registered with the name of E. Hurlbert, Jr., Manager, following the amount of the note in the discount register, in the column "How secured."

Q. And what rate of interest do they bear as shown by the Discount register?

A. I don't know as to that now. I could easily tell what rate was put on the Register, but I didn't examine that each time.

Q. Aside from these four items that you have mentioned do the books disclose that any interest was paid at any other time on these notes?

692 A. The only examination one could make would be at the time the notes were taken, or at the time they were marked paid on the books.

Q. What was the result of that examination?

A. I have already given that result. There was only five of these notes that showed that any interest had been paid, that is there are only five interest payments.

COURT: How much does that aggregate?

A. The total amount of interest on these five items, as I make it is $2031.19.

Q. And how much do the notes amount to?

A. Those I have traced the aggregate is $755,000.00.

693–707 Q. I will ask you to examine the books of the Capital National Bank to ascertain what overdrafts the bank had at the time of its suspension, particularly calling your attention to the accounts of C. W. Mosher, of Mosher & Outcalt, of E. Hurlbuert Jr., of the Western Manufacturing Company, and of Stark & Mosher and will ask you to state the amount of overdrafts if any,

in each of those accounts, just enumerated, referring to the open account, shown on the books of the bank, at the suspension of business January 21st, 1893.

A. Mosher & Outcalt overdraft	$8983.36
C. W. Mosher per	2927.59
Stark & Mosher	16901.84
Western Manufacturing Co. No. 1, "C. W. M., per."	1361.79
E. Hurlbert Jr. Col.	1756.09
Total	$16720.67

Mr. THOMAS: You may take the witness.

708 Q. They may be renewals of a previous indebtedness.
A. Yes sir.
Q. But how many of them were you couldn't say?
A. I say I haven't made that computation.

Mr. WHEDON: That is all.

Further cross-examination.

By Mr. DEWEESE:

Q. Mr. Whitmore, I call your attention to the evidence you gave the other day in regard to discrepancies in the stat-ments made of the condition of the bank as compared with the books of the bank,—isn't it true that a stat-ment, or report of a bank is made for the purpose of showing all of the assets and all of the liabilities of a bank?

A. That is one of the purposes, yes sir.

Q. The stat-ments that you have testified to are the stat-ments that are required to be made under the Banking Act of Congress to the Comptroller, and published in the newspapers?

Mr. THOMAS: The plaintiff's object as calling for a conclusion and opinion of the witness, not proper cross examination, not the best evidence, and it is an attempt to inject a federal question into the issues in these cases, and immaterial as to by what law and by what authority it is required.

Objection overruled.

The plaintiffs except.

A. They were such statements and reports.

709 Mr. THOMAS: The plaintiffs move to strike out the answer of the witness because it is giving the opinion of the witness upon a question of law, and not upon a subject of fact, nor is it his opinion based upon any books which he has been examined upon.

Motion overruled.

Plaintiffs except.

Q. I will ask you whether these reports are made upon blanks furnished by the Comptroller, under certain headings, and calling for certain accounts of the bank.

Mr. THOMAS: The plaintiffs object as incompetent, irrelevant, and

immaterial, not proper cross examination, calling for a conclusion of the witness, and assuming and an attempt to inject a federal question which is not involved in these cases, and for the further reason that the witness is not shown to have knowledge.

Objection sustained.

The defendants each separately except.

Q. I will ask you to state whether these reports that you have referred to are made on printed blanks that have certain designated headings under which the assets of the bank are sought to be listed.

Mr. NORVAL: The plaintffs object as the witness has not shown that he knows what forms they were.

Objection overruled.

The plaintiffs except.

710 A. The discrepancies to which I have testified, I have arrived at them from an examination of the books of the bank, and the exhibits introduced here in evidence, which are copies of the newspaper publications, and those copies were made by the court reporter, or made by somebody and checked up by the court reporter. I don't know anything about the copy that was furnished the newspaper, whether it was on a form or not.

Q. You have been a bank examiner I believe, of National Banks?

A. Yes sir.

Q. Do you know what is the basis of those newspaper publications?

A. Yes sir; I do.

Q. And what is it?

Mr. NORVAL: The plaintiffs object as incompetent, irrelevant, and immaterial, and not proper cross examination.

Objection sustained.

The defendants each separately except.

Q. You may state whether that publication in the newspaper is from a report made by the President and Cashier of the bank and attested by three directors, to the Comptroller, and the publication being made in accordance with the law governing reports of the condition of National bank-?

Mr. THOMAS: The plaintiffs object as not proper cross examination, incompetent, irrelevant and immaterial under the issues, the witness not having shown that he knows, and calling for matters that he could not know.

Objection sustained.

The defendants each separately except.

711 Q. And I will ask you whether in the reports thus made these publications resulted, and that the headings under which the different classes of assets was called for are the same as the headings in the bank's books as kept by the Capital National Bank.

Mr. THOMAS: The plaintiffs object as not proper cross examination, calling for a conclusion of the witness, incompetent and irrele-

vant, calling for an opinion of the witness, and assuming that he has examined matters necessary for an answer.

Objection overruled.

Plaintiffs except.

A. You mean "from which these publications resulted."

Q. I suppose so.

A. The form furnished by the Comptroller of the Currency upon which reports of condition are made to him by the banks, does not agree with the names of accounts that were kept upon the general ledger of the Capital National Bank, in all cases.

Mr. NORVAL: The plaintiffs move to strike out the answer as not responsive.

Motion overruled.

Plaintiffs except.

A. I haven't answered that part as to whether it resulted in the publications, but I have answered,——

Q. Is the published statement or statements about which you have testified the same as was made on the form furnished by the Comptroller?

Mr. THOMAS: The plaintiffs object as not proper cross examination, incompetent and immaterial and calling for a conclusion of the witness.

712 Objection sustained.

The defendants each separately except.

Q. I will ask you whether these statements from which you have testified are in and of themselves a publication made from the report on the blanks furnished to this bank by the Comptroller of the currency?

Mr. THOMAS: The plaintiffs object as incompetent, irrelevant and immaterial, not proper cross examination, and as predicated upon matters not shown, that there was a printed form furnished this bank, of which this witness has no knowledge.

Objection sustained.

The defendants each separately except.

Q. I will ask you whether these statements to which you have referred are made independently of the requirement of the Comptroller under the National Banking Act for the making of the same, and the publication of the same in the newspapers as is required by the law governing National Banks?

Mr. THOMAS: The plaintiffs object as being an attempt to inject a federal question, and for the further reason that it is incompetent, irrelevant and immaterial, not proper cross examination and asking for an opinion of the witness.

Objection sustained.

The defendants each separately except.

Q. You may state whether these statements that you have testified about are made independently of the reports and are different from

the reports that were made to the Comptroller of the Currency, or are they copies of the same?

Mr. THOMAS: The plaintiffs object as not having been
713–754 shown that there were any reports of that kind to the Comptroller and assuming, and immaterial.

Objection sustained.

The defendants each separately except.

Q. You may state whether the headings under which the assets and liabilities of the bank appear to be listed in the published statements about which you have testified are the same in all respects as the headings, or subjects or titles, for assets and liabilities as kept in the books of the bank.

A. The names of the several accounts are not the same on the books of the bank as in the copies of the published statements which I have examined in all respects.

Q. And these published statements that you refer to constitute the basis of the condition of the bank of which you have testified with reference to discrepancies.

A. Yes sir, I have compared these published statements with the books of the bank, that is these copies of published statements.

* * * * * * *

755 Q. Calling your attention to the credit of $100,000.00 which appears to the account of the State Treasurer under date of December 24th, 1889 and referring to the cross examination of Mr. Deweese in which I think it was intimated that that might just have been written in by some one, and did not enter in as a part of the books. I will ask you to state what the facts are with reference to that, that is, whether or not this entered in and upon the book, was a part of the books and transactions of the bank and entered into that account as shown by the books, if you know.

756 & 757 A. The entry of $100,000.00 in the credit column of the State Treasurer's account was used in that account on that day in making up the balance due the State Treasurer at the close of business December 24th, 1889, and it appears to be regular so far as his checks and deposits are concerned from that time on.

* * * * * * *

758–764 (By Mr. THOMAS:)

Q. Can you and will you procure the remaining nine books that are missing if counsel for defense desired them?

A. Yes sir, I will do so.

Q. Have you examined the balance books, the individual balance books from this date in December 1889 until the date in December 1892 to ascertain if this discrepancy of $100,000.00 continues during all of the period?

A. I have.

Q. Does it so continue?

A. Yes sir.

* * * * * * *

765 Q. Now referring also to that portion of your examination in which you were asked in regard to the change in the Stocks & Bonds account, wherein $30,000.00 was eliminated from that account and added to the Bills Receivable account and particularly calling your attention to the question of counsel in which you were asked if that entry injured the bank in any way. Now I will ask you this question, do the books of the bank indicate that at that time there were any Bills Receivable went into the bank to make up the $30,000.00 that was erased from the account of Stock & Bonds?

766 A. The books don't show that any Bills Receivable were taken by the bank to account for the increase of thirty thousand dollars.

Mr. DEWEESE: Do they show that anything was taken out?

A. No sir.

Q. Does that item of thirty thousand dollars that is stricken from Stocks and Bonds afterwards appear on the books as far as you have been able to find?

A. No sir. I don't think that I have found anything that would indicate that that was returned.

Q. Then do the books indicate that those Stocks & Bonds, if there were any, did not appear in the bank after that time?

A. I think that is true.

Q. And do the books also indicate that no Bills Receivable went into the bank during that transaction, and as a part of it?

767 Q. You may state in your opinion what was the nature of that transaction based upon your examination of the books, and your knowledge as an expert accountant, and state from that why you think it was done, that is why the changes were made.

768 A. The effect of these erasures was to reduce the amount which the bank had in Stocks & Bonds and to increase the amount which the bank had invested in loans and discounts. And there being no entries upon the Journal of such transactions in those accounts on that day, I conclude that the motive for making the changes was to make a different showing upon the books of the bank as to the conditions of those accounts.

Q. If as you say you don't think any Bills Receivable actually went into the bank, and that Stocks & Bonds to that amount evidently were taken out of the bank, what in your opinion was the effect it would have upon the assets of the bank?

769–792 A. Well if Stocks & Bonds were taken out to the amount of thirty thousand dollars, and no Bills Receivable put in, why of course it would reduce the assets of the bank to that amount.

* * * * * * *

793 Q. Now Mr. Whitmore in your examination of the books wherein you have ascertained the dividends declared and what the expenses etc. were charged against Undivided Profits, or other places where they might properly be charged you may state if you found on the books any instance wherein the Capital National Bank ever charged anything off on its books as bad debts.

794-811 A. As to the Marsh National, I couldn't say. As to the Capital National, I have been unable to find anything on the books to show that any losses were charged off except that on February 2nd, 1892 the Surplus account is reduced $30,000.00. On that day there were a number of notes marked paid, and there were certain entries made in the Redemption fund account, and wages and taxes paid and several other accounts, and premium account, and Stocks & Bonds account, but there is nothing in the entries to indicate that those thirty thousand dollars taken from Surplus was used for that purpose, except the fact that the Surplus was reduced thirty thousand dollars, and these other accounts I have mentioned as having entries made in were nearly wiped out. There is a total amount of $11,095.25 of that. And then there were a number of bills that were paid, but of course I couldn't tell whether they were marked paid and charged off as a loss, or whether they were actually paid. I couldn't account for the use of this thirty thousand dollars surplus except that it was used to charge off items.

* * * * * * *

812 Q. I now hand you exhibits identified by the Notary Mr. Ricketts and referred to in the depositions of McDonald, Hale and others, identified as Exhibits No. from 147 to 923½ inclusive, being certificates of deposit issued by the Capital National Bank prior to its suspension and outstanding and unpaid at the time of its failure, and which were subsequently filed with the Receiver as claims against the Capital National Bank, and by the Receiver allowed, and will ask you if you have compared these certificates of deposit and checked them over, with the books of the Receiver, to ascertain if the amount called for by the certificate of deposit, and the amount allowed by the Receiver on each certificate agree.

813 A. I have checked over the exhibits referred to and have compared the amounts, with the amounts shown on the Receiver's book, and the two agree.

* * * * * * *

Mr. THOMAS: We offer in evidence Certificates of Deposit issued by the Capital National Bank, identified by the Notary Mr. Ricketts, also by the court reporter as exhibits Nos. from 147 to 923½ inclusive.

814 Exhibits, Nos. from 147 to 923½ inclusive received and exhibited in evidence. (A list of which may be found herewith.)

Mr. THOMAS: We now make the same offer separately and severally for No. 148 and for each number thereafter to and including No. 923½ each of said exhibits being identified by the Notary Mr. Ricketts, and by the Court reporter and the numbers indicated and shown are referred to in the depositions of Mr. McDonald and Mr. Outcalt, and Mr. Hale, and are identified by them. They being certificates of deposit to the Capital National Bank issued prior to its failure and which were outstanding and unpaid at the time of its suspension, and were subsequently filed with the Receiver as a claim against the bank, and by the Receiver allowed for the amount severally shown by each certificate, and Receiver's Certificate issued

815

Date.	No.	To whom issued.	Amount.	
1887.				
Mch. 2	15775	S. H. King	1000	
	6	" " "	1000	
	7	"	1000	
	8	"	1000	
	9	"	1000	
	15780	"	1000	
	1	"	1000	
	2	"	1000	
	3	"	1000	
	4	"	1000	
Mch. 3	15789	Mrs. G. D. King	1000	
	15790	"	1000	
	1	"	1000	
	2	"	1000	
	3	"	1000	
	4	"	1000	
	5	"	1000	
				(17000.00 in pencil)
1888.				
May 1	17987	E. J. Randall	1700	
Jan. 9	17458	Effie B. Mosher	210	in pencil
				(1910.00 18910.00)
1889.				
July 18	20472	Mrs. R. A. Whitmore	200	
Nov. 11	21161	Mrs. J. C. White	50	
June 22	20309	Anna Swanson	70	
19	20292	S. J. Gardner	6000	in pencil
				(6320 25,230.00)
1891.				
Feb. 2	23922	Thos. Farrel	1015	
Apr. 10	24362	F. Newton	32	
May 9	24541	Lydia Greeman	371.66	
16	24590	E. H. Allen	641.60	
July 5	24910	Hannah Goldberg	100	
	1	"	200	
	2	"	200	
	3	"	200	
	4	"	50	
6	24852	N. Johnson	1300	
25	24977	John A. Peterson	250	
28	24989	John A. T. Hibbs	200	
	24990	"	95	
29	25003	Lydia Greeman	230	
Aug. 3	25024	C. A. Rousch	65	
10	25063	Thos. Farrel	1062.12	
14	25083	C. N. Rousch	20	
22	25129	John A. T. Hibbs	200	
	25130	"	250	
Sept. 6	25269	Thos. Farrel	215	
24	25324	Sam'l McClay R—	2423.97	
Oct. 19	25483	Maud Hammond	7.50	
	9	Lydia Greeman	300	
24	25518	John A. T. Hibbs	200	
Nov. 30	25702	Doctor A. Vogt	500	
Dec. 11	25797	Frank Newton	65	
15	25822	Rob't Smith	100	
16	6	Rob't Weese	200	
17	25830	Rob't Smith	100	
22	25855	L. Krueger	300	in pencil
				(9938.85 35168.85)
1892.				
Jan. 1	25990	Wm. Vogt	500	
2	25921	J. C. White	200	

Date.	No.	To whom issued.	Amount.
1892.			
Jan. 2	25929	R. Weese	800
4	25948	Humphry Bros. Hdw. Co.	1500
6	25957	D. O. Ogg	18
7	25968	Hi Ormann	140
11	25987	Ernest Hoose	100
88			
Jan. 11	25988	Minnie Harse	50
13	25989	Mrs. M. W. Magoon	40
13	26009	D. K. Campbell	90
13	26063	C. G. Aronson	50
15	26019	Frank Newton	47
19	26042	C. J. Bills, Pres't.	500
	3	"	300
	4	"	200
20	26052	"	60
20	3	"	30
21	5	Henry Scarce	50
21	26304	P. H. Miller	80
25	28113	Christina Herrman	150
28	26086	Tillie Furst	100
29	26091	Sadie Senneg	120
30	3	F. A. Sruell	130.29
Feb. 1	26111	A. Bartle	100
1	26120	Ella C. Sathan	42.43
1	26123	Henry Berger	100
	5	May Keeland	20
3	26134	Mrs. M. W. Magoon	60
4	26142	F. A. Truell	300
	3	C. H. Marsh, Treas.	100
5	26151	Lulia Menlove	15
9	26170	S. H. King	100
9	1	T. B. Beach	500
9	5	Wentzel Kucua	100
10	8	Herman Koeing	100
12	26191	Peter Starke	400
5	26209	Mary Berryman	75
16	26212	Jno. Weilman	600
	8	S. H. King	200
17	26221	Jno. Kane	1500
	4	J. P. Lulboat	300
18	26233	Lucy Hoppe	800
20	26239	Mrs. S. L. Larimer	950
20	26241	Fannie French	125
	4	John Aronson	60
23	26253	M. C. Johnson	25
24	8	Fred Weinard Jr.	500
27	26293	G. J. Keller	300
	4	"	200
29	26283	S. H. King	800
Mch. 1	26305	George Knapp	200
1	26312	Hogt Blaney	100
2	7	S. H. King	600
	8	"	600
	26324	Mrs. Lucy Hoppe	200
3	5	S. H. King	1000
	6	"	300
	26333	Mrs. Eshlomer	150
5	27118	S. & C. Mayer	2000
5	9	" "	2500
	26340	C. J. Rearson	212
7	26355	S H. King	800
8	26371	Mrs. Elizabeth Eshleman	950
9	26374	Tillie Furst	200

Date.	No.	To whom issued.	Amount.
1892.			
Mar. 10	26381	Henry Voderberg	100
	6	Mrs. S. C. Larimer	100
11	8	" " "	432.50
12	26401	Henry Stine	270
15	26427	Mrs. M. W. Magoon	50
16	26430	Mrs. Geo. Kraft	100
817			
Mch. 16	26431	F. Newton	30
16	4	Wm. C Haynes	875
21	26460	Charles Hammond	3.50
	2	Charles Humann	200
22	26472	Willard Hammond	2
24	26490	A. W. Kiser	70
25	7	M. Meier	3520
26	26502	Sallie Aronson	55
28	7	Job P. Kirby	1600.75
	8	Thos. Ed Tyres	200
28	26512	A. McWhinney	2000.00
30	26521	Wm. Schroeder	2000
	6	Mary Berryman	170
31	26528	John A. T. Hibbs	250
	9	W. C. Haynes	1700
	26530	"	1200
Apr. 1	26536	Alice G. Bronley	78.75
1	26546	May Keeland	20
4	26554	Sam Lee	300
5	26298	Carl Sock	100
6	26575	Wm. Teason	500
	6	D. O. Osting	40
7	26588	Wm. Frasier	150
8	26595	S. H. King	300
	9	Caroline Albee	200
	26600	D. K. Campbell	120
	1	Geo. Howard	53
8	2	Job P. Kirby	3452
9	26605	Eddie T. Armsun	10
	26607	Mrs. M. W. Magoon	40
11	26619	Henry Voldenberg	100
11	26621	Martha C. Broker	25
12	26627	Geo. Emery	40
	26659	Louisa McWinnie	100
13	26631	Geo. W. Landers	350
14	6	Wm. Wilson Guardian	210
15	26640	Mrs. J. C. Taylor	700
16	26651	Wm. Brings	50
16	26654	Fred Enzion	200
18	26663	C. C. Aold	100
	5	Frank Pacal	100
	6	H. O. Weese	150
19	9	Henry Ortmann	310
19	26671	H. J. Becker	200
	3	J. P. Sullivan	100
20	9	S. H. King	100
	26681	Louisa Nanclir	50
23	3	Chas. Wergen	150
25	26700	Wm. Schultz Jr. Guardian	1000
	4	N. C. Christensen	50
26	9	Hattie Keegar	690
27	26712	Friend Buel	500
	4	John Hallwig	600
29	26730	Marz Zikmun	200
May 2	26742	Christine Small	15
	4	Dora Markson	35
	6	F. G. Heber	25
	26754	Henry Berger	100

Date.	No.	To whom issued.	Amount.
1892.			
May 5	26768	Rev. B. Sprall	700
6	26777	H. C. Keller	300
10	26786	Henry Bickert	250
618			
May 13	26799	Mrs. Maggie Tyler	900
14	26807	John Aronson	160
	28815	S. H. King	100
16	26818	First National Bank Poultney.	....
16	3	C. F. Reda	100
	26823	Louisa McWhinnie	650
	6	Lynne Roche	172
19	26830	Honora Seward	300
19	3	Elizabeth Eshleman	100
19	4	" "	300
	7	M. E. Johnson	75
20	8	Frederick Obert	500
	26841	Carl Elfeldt	500
20	3	I. W. Lansing Co., Judge	625
23	9	W. Kucera	100
24	26853	L. Koch	376
25	6	Harry C. White	300
27	26861	Caroline Albers	200
27	26863	Ella C. Latham	291.80
	4	R. H. Thorp	1100
28	26848	De Vries	385.87
31	26875	W. J. Johnson	100
	6	George Ortmann	750
	7	" "	100
June 1	56900	Frances Spaulding	2398
	26898	Rob't H. Bear	150
2	26904	Geo. Divis	50
3	26913	W. J. Jenkins	700
	4	Mrs. Lis M. Prate	400
	26916	Mrs. Jennie E. Fitchie	2500
4	26926	Schroeder & Beckman	500
6	7	Mrs. J. C. White	50
7	26939	Rob't Arenson	100
8	26944	L. Sillman	200
	26943	Wm. Brings	100
9	26953	Frances Spaulding	500
	4	John Blado	50
10	6	S. H. King	200
11	26974	Rob't Smith	160
15	27002	Tillie Furst	100
16	27007	Austin Humphrey	1040
	8	Carl Elfeldt	800
	27010	Aug. Jan	100
	2	H. Veith *et al.*	4112.08
17	5	Dan O. Osting	12
18	27018	Eugene Braher	110
	27021	Louisa McWhinnie	100
21	27029	C. Hammond	5300
23	27042	Joseph Troop	100
24	27050	Frank Newton	85
	4	John Finigan	350
25	9	W. S. Linord	1600
27	27062	J. J. Hammel	100
	3	" "	50
	6	Cassius S. Weese	2000
	27072	B. Steffens	600
30	27085	A. J. Doran	550
	27077	S. Meyer	10000
29	28100	Mrs. Mary W. Brobse	1785.70

Date.	No.	To whom issued.	Amount.
1892.			
July 1	27091	Joseph Troop	150
	4	May Keeland	15
1	7	Dora Workow	60
2	27107	Fred Block	390
	8	E. Menlove	17
	27111	Thos. W. Harrison	500
819			
July 2	28296	Nettie M. Snyder	200
3	27253	S. H. King	100
5	27115	Jno. Odman	50
	27124	L. D. Laune	500
	7	Martin Schwartz	500
	8	Catherine Schroeder	134.83
6	27130	H. C. Tullis	100
6	2	John McManigal,	3000
	4	Henry Croop	400
	5	Mrs. Emma Frazier	166.68
7	8	A. Bartle	230
	9	John Weilenman	700
	27140	" "	700
8	8	Jno. A. T. Hibbs	500
	9	" " "	500
	27150	" " "	400
	1	" " "	3000
	2	" " "	3000
	4	" " "	100
	5	" " "	100
	6	" " "	100
	7	" " "	400
	8	" " "	500
	27160	" " "	2000
9	5	" " "	131.27
	27171	Robert H. Bear	50
12	5	Geo. Emery	70
13	8	Mrs. M. C. Moulton	945
	9	Wm. Beckman	1000
14	27184	Miss Zadie Rector	250
	27186	Tillie Furst	200
	27193	Carl Werger	500
14	6	Jno. Bledo	50
15	27205	E. A. King	100
16	27211	Charles Brings	50
	27215	Louise McWhinnie	200
	3	Hans Hanson	100
18	6	E. Bloomgreen	80
	27221	Job. P. Kirby	10000
	27220	W. Kucera	100
	2	Wm. Koch	350
18	4	Mrs. M. E. Harris	300
19	6	Harry Weese	250
20	27234	D. O. Osting	20
	5	Harris Person	50
22	9	Eliza Dougherty	2000
	27242	Charles Hammond	5000
23	27246	Tillie Furst	100
25	3	Carl E. Anderson	110
27	27263	Lucy Hoppe	1300
28	9	Mrs. J. F. Moorey	300
29	27272	Sadie Tenney	55
30	27281	Henry Ortmann	100
Aug. 1	27292	Mags Hansen	100

Date.	No.	To whom issued.	Amount.
1892.			
Aug. 1	27283	Dora Wankon	20
	27291	Tillie Furst	100
	4	Mary Keeland	20
	6	Christine Small	15
	9	W. Chunack	300
3	27303	W. Cucera	100
4	27309	G. J. Gessling	330
4	27311	Ella C. Frasier	225
	2	Mrs. Anna Frasier	150
	3	Mrs. Matilda Englehart	121.91
820			
Aug. 5	27321	Emma Johnson	30
6	3	C. H. Gould	125
	27332	Louise McWhinnie	100
	6	John Gribsby	200
	7	Gus Beckstrom	236.30
6	27331	Thos. Calkin	1500
	3	John Dalstrom	40
	5	L. W. Gasantle	150
8	6	C. J. Nobes	1272.50
	7	Mrs. T. B. Beach	375
	9	Robt. H. Bear	60
9	27346	Mrs. Schmale	100
10	27356	W. E. Knight	60
	7	J. D. Hubble	3000
11	27360	S. H. King	700
	27359	Mrs. Sarah M. Wierman	200
	27362	M. E. Johnson	25
12	5	A. Bartel	100
	7	H. Oleshloger	100
13	27371	P. J. Hurley	50
13	3	J. W. Lander	100
	27401	Geo. Olcott, Cashier	5000
	6	A. M. Hau	300
15	27381	Jno. Blade	150
	2	Jno. Blade	125.04
16	7	Robert Arenson	100
	9	Thomas Calkin	1500
	27391	F. Newton	55
17	3	I. G. Chase	650
	4	Eugene Brahier	69
18	9	Chris Daukers	600
	27400	Ella Frasier	230
19	6	R. W. Kiser	50
20	27415	Mrs. Minnie A. Salewire	477
23	27425	C. J. Arenson	173.84
	7	Mrs. B. E. Johnson	60
24	27432	Henry Polk	730
25	27442	H. O. Weese	100
27	27458	Kate Smith	30
	9	Henry Scarce	50
	27463	S. H. King	100
29	6	Grass & Co	500
	7	M. Grass	300
	9	E. A. King	400
31	27480	I. F. Schultz	200
Sept. 1	9	May Keeland	20
	27490	Dora Warkow	55
	3	Mrs. Kain	425
2	4	Simon Mook	300
	5	Henry Schwartz	600
	27502	Mi/- Edith Gray	200

Date.	No.	To whom issued.	Amount.
1892.			
Sept. 5	27512	R. W. Kiser	30
	4	E. Bloomgreen	50
	6	Mrs. M. E. Johnson	40
	7	S. H. King	200
	27521	Tillie Furst	100
	27522	H. R. Reimer	177
6	5	Mary Rance	230
	6	Jno. Edmond	1200
	8	H. E. Scacre	150
7	27533	Caroline Albee	50
8	27548	May T. Banis	100
821			
Sept. 9	27543	Merchants Bank Utica, Neb.	2000
	9	C. J. Nobes	640
10	27556	Ella Conard	115
	7	J. W. Lansing	2867
	27606	M. J. Dobson	20
12	27562	Martha Porter	100
	27571	Jno. Blade	85
13	6	L. W. Gasantte	150
	7	George Knopp	100
	27580	Lizzie Nebamas	40
	6	Victor R. McLacey	50
14	7	Jas. H. Schafer	100
15	27620	Emma Johnson	12
16	27606	Selma Olson	15
	9	S. H. King	100
	27851	Philip Schoop	100
17	27613	M. B. Harris	200
19	27630	Mrs. J. F. Moorey	500
	3	H. Frank	160
20	5	Mrs. Nettie Bash	600
21	27643	F. W. Hedman, Jr	348.28
23	27650	H. A. Weese	100
24	9	Thos. Johnson	100
26	27675	Jno. Odman	100
	6	Sarah Shea	200
27	9	Walwood & Co	300
	27682	Mrs. T. F. Lasch	400
28	7	Charley Werger	200
	8	Carl Werger	150
	9	F. Newton	45
29	27693	A. Haase	50
	5	Charles Archer	125.15
	27701	L. B. Kelley	500
	2	" " "	500
	3	" " "	500
	5	" " "	500
	6	" " "	500
	7	" " "	500
	8	" " "	500
Oct. 7	27718	May T. Parris	148
	27721	August Winkley	200
	8	S. P. Benadon	1500
	27744	John Daniels	1000
	5	" "	1000
2	27729	Hattie E. Carson	1166
3	27735	Slema Olson	7
	27757	Tillie Furst	200
4	6	A. E. Green	200
	9	Mariah Andrews	300
	27740	Ellen Klowp	255.10
	9	H. A. Weese	50

Date.	No.	To whom issued.	Amount.
1892.			
Oct. 5	27752	R. W. Kiser	60
	3	P. J. Hurley	25
	27762	Karis Perron	120
6	7	Mrs. J. W. Fay	475
	9	Thos. M. Morphet	400
	27772	H. P. Reimers	599.49
	4	Julia A. Caldinell	2000
7	8	Jno. Kensfater	25
8	27795	Lena M. Smith	200
1822			
Oct. 11	28151	Thomas Bailey	1000
Oct. 10	27805	W. O. Hartquest	300
	27813	Louise McWhinnie	100
	6	May L. Smith	240
	7	W. C. Haqney	686
11	28156	Thomas Bailey	8000
11	27814	John Daniels	1000
	28158	Thomas Bailey	500
	5	John Daniels	500
	6	" "	500
	27820	B. F. Smith	100
	2	Harry Stein	325
	6	George Bowers	50
	27831	L. W. Garantte	150
12	6	Jno. Kensift	30
	8	M. Miner	100
14	27848	Joseph Troop	50
	27850	Emma Hugilmezer	65
	2	Philip Schoop	280
	4	Jno. Teideman	200
15	27865	Mary Berryman	80
	27933	Mrs. S. J. Dwinn	150
17	27868	S. H. King	300
	27870	E. A. King	100
	2	Rob't Aronson	200
19	9	Aug. Gothe	100
	27881	Chas. Brandt	200
	2	Ermin Johnson	10
20	9	C. V. Keith	225
22	27890	Sarah E. Horn	500
	6	H. J. Buller	100
	7	Ella Conrad	1392
	8	W. J. Johnson	100
	27900	Jas. D. Hughes	40
23	27924	Lute C. Young	2000
24	27906	S. H. King	100
	9	Henrietta Wessel	700
24	27910	K. C. Juebb	150
25	4	Lawrence Acker	100
	6	Wm. Wilterdink	300
	8	Mary Sullivan	1525
26	27922	Dr. W. H. Grant	252
27	27932	Richard Adams	100
	7	August L. Arthelm	1000
	27941	Mrs. G. H. Moulton	1025
	2	" " "	141.55
28	5	Mrs. A. M. Van Ness	100
29	7	John Daniels	500
	8	" "	500
	27950	Jno. Kane	200
31	27979	La Salle National Bank	5000

Date.	No.	To whom issued.	Amount.
1892.			
Nov. 1	27960	Anora Lewell	250
1		August Klein	400
3		Humphrey Bros. Hdw. Co.	2000
	28020	Lute C. Young	400
2	27965	Jno. Dee	400
6		Peter Talbert	385
9		Henry Bartels	50
	27970	Sam Rich	110
2		May Malone	30
3	4	Chas. Brigs	50
5		J. H. Shaw	50
6		Sam Rich	175
7		Charles Deahn	175
4	27980	P. J. Kennedy	4505.30
823			
Nov. 4	27983	Dale D. Drain	5
5	4	R. W. Kiser	30
6		Geo. Bauer	45
7	27997	C. F. Wessel	53.20
	28009	La Salle National Bank	5000
8		B. Carey	250
9		S. H. King	100
	28004	Henry Berger	100
5		Henry Berger	50
8		Duncan Campbell	1144.34
9	28015	Charles Werger	250
	28014	Isaac Holt	5000
11	28033	F. C. Haase	300
4		Martha Brahier	30
12	7	Henry Sarer	250
9		S. H. King	500
	28043	Mrs. E. M. Exley	100
14	28064	J. C. H. Ertes	50
15	5	Mrs. J. C. White	65
16	9	C. B. Lauridson	100
17	28077	Frank Newton	50
18	28081	Peter Pommer	500
19	5	Eugene Braher	100
21	28092	Julius Plantz	350
3		Cora L. Outcalt	250
4		Jno. Kensfater	100
8		Mrs. A. J. Elias	300
22	28104	Jno. Schuller	400
5		" "	500
7		Charles Hammond	1600
25	28115	S. H. King	100
	26156	Chas. Hammond	34.80
8		Sarah J. English	1000
	28121	A. Gantt	1000
2		Mrs. Fay	25
26	28134	Hy Scaer	50
5		Mrs. Susan M. Lane	95
	28129	J. Burrows	800
	28139	Rob't Weese	490
28	28142	Mrs. J. F. Moorey	600
3		L. M. Maxwell	10
6		Miss Mary A. Menlons	200
29	9	R. C. Outcalt, Cashier	100
	28150	Francis Spaulding	680
1		Rose Hannon	40
30	3	F. Newton	42
Dec. 1	28160	Sam Rich	75
1		Mrs. C. M. Aronson	80
3		A. E. Eastman	536.75
4		Mary Praarie	40

Date.	No.	To whom issued.	Amount.
1892.			
Dec. 2	7	C. F. Weese	50
	9	Rev. Kossick	150
	28170	Henry Townsen	26.25
3	1	Mamie Tippie	225
	2	R. H. Varney	150
5	28184	Carl Sack	300
	6	M. E. Johnson	50
	7	" " "	100
	28178	Samuel Roose	49
	9	Rev. Kiser	20
	28181	S. H. King	300
	3	C. P. Hill	200
824			
Dec. 6	28189	Theodore Kline	100
	28191	Humphrey Bros. Hdw. Co	2000
	2	Ambrose Kirkendall	216
	7	Fannie Fraut	475
7	28200	L. B. Kelley	210
	1	Tom Wasting	195
	2	P. J. Kennedy	2000
8	7	Louis G. Smith	925
	8	D. E. Bixby	225
10	28220	Henry Stein	250
	8	R. C. Outcalt	500
12	28230	George Bower	50
	1	Andy Bower	50
	4	S. Nooks	80
	6	A. M. Davis	2120
	8	C. A. Munford	150
	9	A. M. Davis & Son	3000
13	28241	Stephen S. Gardiner	1000
	6	Rob't H. Bear	40
	8	H. A. Moler	60
14	28250	Christ Daukers	400
	1	" "	100
	3	M[illegible]a C. Brunson	175
	5	Minn[illegible] Haase	100
	6	Mrs. Maggie Sullivan	400
	9	H. W. Hitchcock	1000
	28260	" " "	1000
	1	" " "	500
15	28225	A. Brown	7
	28266	Miss Cora L. Outcalt	200
16	9	Mrs. Lydia Greenman	600
	28270	" " "	500
	2	Ding Jang	600
	4	Thos. Buckley	100
	7	Daniel Buckley	300
	8	Mrs. J. W. Fay	30
17	28283	Donna A. Wilson	50
19	28294	J. H. Heasley	600
20	28303	W. C. Becton	60
	4	Chas. Werger	600
	6	Jno. E. Grover	25
21	9	Mrs. A. Rima	300
	28315	Charles Hammon	3500
	8	Mrs. Greenman	300
22	28329	Elias Lonsdale	500
	28330	Hanna Hilblink	555
23	3	A. Brown	10

Date.	No.	To whom issued.	Amount.
1892.			
Dec. 24	6	Mrs. A. L. Sherwood	1915
	8	W. S. Sanders	50
	28340	A. C. Schmidt	100
	1	Charles Scaley	405
	2	M. J. J. Cameron	30
	4	Luzia Diamond	1200
	5	Daniel Buckley	202
	6	W. J. Johnson	50
	7	Jno. Kinsfader	40
27	8	Thomas Henshave	100
	9	Susan Hege	25
	28350	Amanda Woods	80
825			
Dec. 27	28351	Indiana A. Falk	866.12
	2	A. Rima	200
	4	Jno. Weilenman	200
	28360	Eliza Dougherty	3000
	1	C. Uthe	20
	2	W. C. Hook	350
28	28371	Thos. Bailey	500
28	9	Amelia Brooks	60
	28372	Thomas Bailey	500
	28374	L. M. Gagen	250
29	7	S. H. King	300
	28382	W. C. Haqney	384
30	5	J. E. Hill	151
	6	L. Stacker	100
31	28390	Mrs. E. L. Knight	145
	4	Rev. B. Sprall	150
	8	J. C. Estes	25
	18401	Jno. Kane	100
	2	H. W. Hitchcock	100
	3	" " "	100
	4	" " "	100
	5	" " "	100
	6	" " "	100
	8	" " "	100
	9	" " "	100
	28410	Mrs. J. P. Sullivan	200
	1	Bertha Rorgan	140
	2	Wm. Johnson	155
Dec. 28	28373	Thos. Bailey	1000
826			
1893.			
Jan. 3	28413	Wm. Mills	70
	28418	A. M. Williams	200
	28423	J. S. Stohl	45
	28424	W. Kucera	100
	28425	Elizebeth Eshleman	155
	28428	Minnie Jor	50
	28430	May Keeland	75
	28431	Lucy Hoppe	100
	28432	Dora Warkaw	60
4	28433	Wm. Mills	60
	28434	Mrs. S. A. Jessup	24
	28435	Manot Auchew	150
	28436	" "	500
	28438	G. A. Southwell	80
	28439	F. G. Huber	20
	28440	Mrs. Lydia Yellsman	216.44
	28442	E. A. King	50
	3	T. E. Davis	410.44

Date.	No.	To whom issued.	Amount.
1893.			
Jan. 4	4	E. E. Squires	35
	5	C. F. Strodman	20
	6	Thos. Coffield	3000
	7	Eliza Lonsdell	1000
	9	M. Kossick	400
	28450	Mrs. Anna Kossick	200
	1	Rob't C. Druesdow	50
	2	M. Kossick	320
	6	R. W. Kiser	40
5	9	W. H. True	35
	28460	Henry Roder	200
	28461	O. H. Martin	35
	2	Helen A. Thrash	58.57
6	5	Rob't Druesdow	50
	6	Leopold Koffer	440
	8	M. Polsky	1043.60
	28474	J. W. Brown	160
	6	Mrs. M. R. Hevens	500
	7	Jno. A. Sittler	200
7	28483	Oscar Heath	26.85
	4	Susan Hedge	20
	7	M. C. Mairara	200
	8	A. M. Abbots	155
	28491	R. J. Cherey	100
	2	L. M. Puyse	10
9	4	C. W-the	8.25
	5	W. M. Sweeney	160
	6	W. J. Johnson	60
10	8	Lee Jessel	135.88
	9	R. W. Kiser	50
	28501	Jno. Danz	100
	2	Jas. R. Anderson	55
	4	W. C. Haynes	52.75
	5	S. J. Donnelly	650
	6	Laura Simmons	40
11	7	Rob't Druesedow	260
	8	James Berwold	125.00
	9	Martin Schwartz	100
	28512	Isiah Lindsey	10
	13	A. Brown	15
	15	Geo. Emery	30
12	16	C. J. Pettit	50
827			
1893.			
Jan. 12	28521	Frank Newton	47
13	22	Catherine Schroeder	100
	28522	Tillie Furst	100
	23	Jno. Blado	400
	24	Hans Hanson	231.06
	25	G. W. Landers	60
	26	Wm. Hinps	100
	27	Mrs. Hannah Lee	490
	28	F. G. Heber	45
	29	W. M. White	100
	30	Wm. Hinps	50
	31	Thos. N. Harrison	100
14	33	J. W. Hawey	25
	28541	Tillie Furst	100
	34	Mrs. L. H. Davis	15
	35	Bertha Eldenbary	495
	36	Mrs. C. M. Parke	50
	37	L. J. Roche	70
	44	H. C. Chaddock	10
	46	Humphrey Bros. Hdw. Co.	1500

Date.	No.	To whom issued.	Amount.
1893.			
Jan. 16	48	Charles Hammond	1.75
	49	W. H. Dinley	500
	50	S. Polwosky	1800
	51	E. Bloomgreen	25
	52	Anna Odman	100
	53	Harry Radford	100
	54	S. W. Wells	10
	55	Charles Talmage	50
	56	Rob't H. Bear	20
	57	H. R. Mober	50
17	59	George Smith H. A	100
	60	W. Sweeney	200
	61	Mrs. B. E. Johnson	25
	62	Ann Williams	20
	63	Wm. Leonard	1000
	64	Wm. Leonard	1000
	65	Wm. Leonard	420
	67	W. M. Frey	50
	68	C. F. Keich	44
	69	Rob't Smith	45
18	71	W. O. Hartquest	200
	73	T. L. Radford	37
	74	Mrs. C. N. Fogg	25
19	75	Samuel Linhart	70
	76	Mrs. A. P. Hernig	20
	77	S. H. King	100
	78	H. Horghinson	400
	80	Theo. Kline	80
	81	Adolf Biltoft	65
	83	Martin Werger	500
	84	Albert Heitzman	150
20	87	Rob't C. Druesedow	60
	28585	Charles Hammond	0.90
	90	Feton & Campbell	96
21	91	Collections	10000
	28594	Charles Hammond	200
	92	C. W. Mosher, Pt	2000
	93	Geo. Darton	25
	95	C. C. Waldo	400
	96	Rob't C. Druesedon	150
	97	Willard Hammond	3.25
	98	Fred B. Humphrey	214
	99	Chas. Werger	300
828			
Jan. 21	28600	Sarah A. Jessup	34.53
	1	Josephine Cline	10
	2	Geo. C. Baumann	350
	3	J. B. Stewart	450
	4	Katie Harman	40

829–863 Exhibits Nos. from 148 to 923½ inclusive separately and severally received in evidence and exhibited.

Mr. THOMAS: That is all with this witness for the present.

* * * * * * *

864 Mr. E. JACOBS being called as a witness on behalf of the plaintiffs and being first duly sworn testified as follows:—

Redirect examination.

By Mr. THOMAS:

Q. You may state your name and age?
A. E. Jacobs, age 46.
Q. You reside in Staplehurst in this county?
A. Yes sir.
Q. How long have you resided there?
A. About twenty years.
Q. What is your occupation?
A. Banking business.
Q. Since when?
A. Since 1886.
Q. With what bank have you been connected if any?
A. Bank of Staplehurst.
Q. One of the plaintiffs in these cases?
A. Yes sir.
Q. What official position if any have you held in that bank since 1886?
A. I have been Cashier and President of the bank.
Q. When were you Cashier?
A. From 1886 to 1894.
Q. And when have you been president?
A. From 1894 until now.
Q. You are the President of the bank now?
A. Yes sir.
Q. During the time you have been connected with the bank, since 1886 who has had the management of the affairs of the bank?
A. I have had the management from the beginning.

865 Q. Now you may state of the Bank of Staplehurst, while you have been its manager kept on deposit all moneys in the Capital National Bank of Lincoln?
A. Yes, sir.
Q. When did you first begin depositing money in that bank?
A. In 1886.
Q. And how long did you continue making deposits in that bank?
A. Until 1893, until the bank failed.
Q. You mean until the Capital National Bank failed?
A. Yes, sir.
Q. State whether or not you kept a continuous account with the bank from 1886 until its failure in 1893?
A. Yes, sir, we have done business there from 1886 until 1893 right along.
Q. Up until the failure of the bank?
A. Yes, sir, up until the failure of the bank.
Q. Who kept the books of the bank during 1886, that is of the bank of Staplehurst, and from then on until 1893?
A. I did.

Q. Have you the original books of entry with you showing your account with the Capital National Bank?

A. I have a part of them.

Q. Have you the book of original entry showing the amounts that were sent by your bank to the Capital National Bank?

A. Yes sir.

Q. The books of original entry?

A. Yes sir.

866 Q. Does that contain all amounts that were sent to the Capital National Bank and properly chargeable to that bank?

A. Yes sir.

Q. And have you the book in which is contained all credits to which the Capital National Bank was entitled in the course of your business transactions with it?

A. Yes sir.

Q. Are you able to state at this time how much money the bank of Staplehurst had on deposit in the Capital National Bank, and which the Capital National Bank was owing the bank of Staplehurst at the time of the suspension of the Capital National bank, January 21st, 1893?

A. It is about fourteen thousand dollars. I couldn't state the exact amount?

Q. Can you by refreshing your recollection from the books of the bank state the exact amount?

A. Yes sir.

Q. You may do so.

A. It was $14,264.33. There was a difference of 22¢ between the Receiver's books and ours. That was changed later on to correspond with the receiver's certificate. This shows 33¢ and the receiver's certificate called for 11¢.

Q. Is the amount which the Capital National Bank owed the bank of Staplehurst filed as a claim with the Receiver of the Capital National Bank?

867 A. Yes sir.

Q. Have you the Certificate of the Receiver allowing your claim the claim of the Bank of Staplehurst against the Capital National Bank?

A. Yes sir.

Q. With you?

A. No, I haven't got it with me.

Q. Do you know Mr. Jacobs who were some of the directors of the Capital National Bank during the time that the bank of Staplehurst kept an account with the Capital National Bank?

A. Yes sir.

868 Q. I will ask you to state if during that time that you on behalf of the bank of Staplehurst kept on deposit and deposited these various amounts, you saw any published statements of the condition of the Capital National Bank, stating its resources and liabilities?

A. Yes sir.

Q. When did you see those statements referred to?

A. I seen them every time there was a call made from the Comptroller to send in a bank stat-ment

Q. You may state to the jury fully what you did with reference to those reports as they came out.

A. Well that is the only source I had to see the standing of the bank and keep myself posted of its standing and liabilities.

Q. What did you do in order to keep yourself posted on its standing, that is the condition of the bank, as to its liabilities and whether it was flourishing?

A. I always looked up the statements when they were published, in the paper.

Q. You mean the published statements?

869 A. The published statements of the bank report.

Q. In what paper?

A. Well I couldn't remember.

Q. You may state whether you know whether or not you saw all of their statements that were published in the papers from the time you commenced doing business with the Capital National Bank until the time it suspended in January 1893?

A. As near as I remember I seen them all.

Q. What makes you think you saw them all?

A. I had to have a safe place to deposit the money and that is the only way I could keep myself posted as to the condition of that bank.

Q. During the time that the Bank of Staplehurst was doing business with the Capital National Bank in the way you have suggested did you see or read any of the Lincoln papers?

A. Well I have seen the Call and the Journal. The Evening Call.

Q. And did you see the notices of the condition of the Capital National Bank that were published in those papers?

A. As near as I remember I seen it in them papers.

Q. Did you see the notice of the condition of the Capital National Bank that were published in those paper-?

A. Yes sir.

Q. What was the Capital stock of your bank in 1886 and up to 1893?

870 Q. In what bank did you keep the bulk of the moneys that were not kept in your own bank in Staplehurst, that is I refer to the cash?

A. In the Capital National Bank.

Q. What other correspondent or bank with whom you made deposits did you have?

A. In the Chemical National Bank of New York.

871 Q. Had you any other correspondent?

A. No sir.

Q. Now I will ask you to state to the jury, how you came to make your deposits, I mean the deposits of the bank of Staplehurst in the Capital National Bank, and use them as your correspondent in Lincoln?

A. According to their published stat-ments the bank looked as if they was good business men running or overseeing the bank as directors.

Q. What reliance if any did you put in those published stat-ments that you saw in the newspapers?

872 —. I put full reliance and trusted them in good faith.

Q. Did you believe those published stat-ments to be true and correct?

A. Yes sir.

Q. Would you have made,——

Q. What effect did these published stat-ments have upon you, if any with reference to your transactions that is the transactions of the bank of Staplehurst, with the Capital National Bank?

873 A. I deposited the money of the bank there, and done my business there.

Q. Did those published stat-ments referred to effect you in any manner with reference to doing business there?

A. Yes sir.

Q. In what way?

874 A. I took confidence in that bank.

Q. By reason of what if anything.

A. The stat-ments showed up well.

Q. State what those stat-ments disclosed as to the solvency or the insolvency of the bank, or whether it was doing a good business or whether it wasn't.

875 Q. Did you at any time you did business with the Capital National Bank know of Mr. Yates, and Mr. Hamer and Mr. Walsh and Mr. Thompson, and Mr. Stuart, and these various parties who were directors of the Capital National Bank?

A. Yes sir.

Q. You may state what was their standing so far as you were advised and learned, as men of business affairs of honesty and integrity and men of ability to honestly and faithfully and successfully conduct and supervise an institution like this one, the Capital National Bank.

A. I have heard of them as being honest and successful business men.

Q. What reliance did you put in that fact if any?

A. Well any honest and successful business man will attend to the business he is running and overseeing.

Q. Had you heard of these men, these directors, that I have referred to, before in a business way, heard anything about them, their reputation?

A. Yes sir.

Q. I will ask you if you can give us a stat-ment Mr. Jacobs of the amounts that the Bank of Staplehurst had on deposit with the Capital National Bank on an average from the time you commenced depositing money there in 1886 until the date of its failure in January 1893.

A. I can by looking it up.

Q. How long would it take you to ascertain that? Mr. Jacobs were you in court when the copies of the Daily Call and State Journal which contained these published reports were introduced in evidence?

A. I was here yes sir.

876 Q. Now you may state if you saw those published stat-ments that were contained in those papers when the papers were,——

A. You mean here?

Q. No at the time the paper was published?

A. I did see the stat-ments, yes sir.

Q. Do you know how many there were published each year?

A. Five, as near as I can remember.

Q. Has any of this amount which the bank of Staplehurst had on deposit at the time the bank failed, been paid, if so state how much.

A. Yes sir, seventeen per cent. paid.

Q. By whom was that paid to the bank?

A. By the receiver of the bank.

Q. Can you give us the dates of those payments?

A. No sir.

877 Q. Do you mean seventeen per cent. of the balance, at the time of the failure?

A. Of the principal, of the total.

Mr. THOMAS: That is all.

Cross-examination.

By Mr. DEWEESE:

Q. What date was it that your account commenced in the Capital National Bank?

A. It was in February 1886.

Q. Was that the first time that you had any account there?

A. The first time I had an account there.

Q. That is the Bank of Staplehurst?

A. Yes sir.

Q. Did you start this bank of Staplehurst, or had it been running before?

A. It had been running before.

Q. By somebody else as owner?

A. Yes sir.

Q. Who was that?

A. Geary and Carmickle.

Q. And had they had their account there in the Capital National Bank?

A. Yes sir.

Q. How long had they had it there do you know?

A. About two months I think.

Q. Was that when they first started the bank?

A. Yes sir.

Q. Probably in November of 1885 then?

A. November or December of 1885.

Q. And then did you buy them out?

A. Yes sir.

878 Q. And you just continued the account right along?

A. Yes sir.

Q. And did you check out, take part of it out from time to time whenever you wanted to?
A. Yes sir.
Q. You drew drafts and checks on it?
A. Yes sir.
Q. And they were always honored and paid up to the time of failure were they?
A. Yes sir.
Q. Were you ever in Lincoln before you bought this bank of Staplehurst?
A. Yes sir.
Q. Did you have any personal acquaintance with the President, and Cashier of the bank?
A. No sir.
Q. Did you ever see Mosher?
A. I have seen him.
Q. Did you ever see Outcalt?
A. Yes sir.
Q. Before you bought into the bank at Staplehurst?
A. No sir.
Q. How long afterwards?
A. I couldn't tell you.
Q. Did you have any personal acquaintance with any of the Directors?
A. No sir.
Q. Did you ever look at the books to find out who were the Directors?
A. In their books of the Capital National Bank, you mean?
879 Q. Yes sir.
A. No sir.
Q. Who did you understand were directors when you bought the Bank of Staplehurst?
A. There was Thompson, Stuart, Yates, Hamer and I believe Holmes.
Q. Did you know any of these men personally?
A. No sir.
Q. Had no acquaintance with them?
A. No acquaintance at all with any of them.
Q. And did you ever talk to Mr. Mosher?
A. Yes I have once or twice, that is about all.
Q. About the bank in any way, about matters in the bank?
A. How do you mean?
Q. Well did you talk about religion, or politics, or banking business what was the subject that you talked about?
A. Well I had very little talk with him that I remember, I couldn't remember.
Q. You don't know what you talked about?
A. I couldn't remember, no sir.
Q. Did you have the conversation in his bank?
A. Yes sir.
Q. You continued your account right along?

A. Yes sir.
Q. Did you get any compensation, or interest for your deposit in the bank?
A. Yes sir, some.
Q. Do you know at what rate?
A. Couldn't remember no sir.
880 Q. Six per cent. wasn't it?
A. Well sir, I don't remember.
Q. Do you know what other banks were paying in Lincoln, or Omaha at that time?
A. No sir.
Q. What newspapers did you take in February, and from that time on in 1886, did you take any?
A. I couldn't remember what papers I did take at that time.
Q. Did you take the Lincoln Call?
A. No sir.
Q. Did you take the Lincoln Journal?
A. No sir.
Q. When did you see any of those papers?
A. They were kept there right along in Staplehurst.
Q. Who kept them ?
A. If I remember right it was Hartman & Dunn, they were kept mostly for the market, for the market reports.
Q. They wouldn't keep the Call for that would they, the Call didn't have the market reports in it, the Evening paper, the Call the Evening Call was an Evening paper.
A. Yes sir.
Q. And didn't have market reports.
A. I think it had the grain market in there.
Q. Do you really remember now that you did see the Call?
A. I did see the Call?
Q. What report did you see in the Call?
A. That I wouldn't state, I couldn't state that.
Q. Are you sure that you saw any of the bank report in it?
A. Yes sir.
Q. But you couldn't state which one?
A. No sir.
881 Q. You couldn't tell,—What month did you see it in?
A. I couldn't remember.
Q. Can you remember that you saw it in 1886 at all?
A. I couldn't tell.
Q. And do you remember that you saw the Lincoln Journal in 1886?
A. Couldn't say.
Q. If you didn't see either of those papers in 1886 then you did not see any of these reports did you?
A. All I can state is that I watched the reports, and seem them every time there was a call made, and that is all I could say. It is too long for me to remember particulars.
Q. How do you know that you saw them if you don't know whether you saw a paper in 1886.

A. Well that is all I could state, that I watched the statements and the reports and seem them, and that is all I could state.

Q. Was your bank a National Bank?

A. No sir.

Q. How did you know when the calls were made by the Comptroller for those reports?

A. It is generally stated in some paper or another.

Q. Now you are testifying as to facts, do you have any recollection of seeing anything about the Comptroller calling for a report from the Capital National Bank?

A. From banks in general that is all.

Q. Some published circular.

A. No sir, just a short sketch I seen in the paper, when the call was made by the Comptroller.

882 Q. Does the Comptroller make these calls by publication in the papers?

A. No sir, not that I know of.

Q. What would you see then?

A. It is just a short stat-ment in the paper, when there is a call made.

Q. A stat-ment for a report, signed by the Comptroller?

A. It is that there is a call made to make out the stat-ments that is about all that I have seen in it.

Q. Well if he wrote a letter to the Capital National Bank and asked them to make a report, you wouldn't be apt to see that letter, you don't mean that you saw that letter do you?

A. I——

Q. Do you mean to say that you saw something signed by the Comptroller?

A. No sir.

Q. What did you see?

—. I seen that in the paper, that is all, that there was a call made.

Q. Announced by the editor.

A. For them to make their stat-ments.

Q. Could you read English then?

A. Yes sir.

Q. And did you read the English newspapers?

A. Yes sir.

Q. What ones?

A. Well sir, I couldn't remember.

Q. Well how do you know that you ever saw any of these reports published in the Call. Can you really remember anything about seeing them?

883 A. I have seen the papers, yes sir, that is all.

Q. And you can't tell what year it was?

A. No sir.

Q. Nor what month it was?

A. No sir.

Q. And did you see the report called for as of date January 1st, 1887.

A. I couldn't remember any distinct dates.

Q. Well can you remember any report that you say, anw one?
A. No, sir.
Q. You can't remember any of them? Did you see more than one?
A. Yes sir.
Q. How many did you see now, speaking from your recollection, you might make a computation, or calculation, but do you remember of seeing more than one?
A. Yes sir, I remember. As near as I remember I have seen them all because that was what I was watching for, to keep myself posted to see their stat-ments.
Q. If you don't know how many were published, how do you know that you saw them all?
A. I have seen them all as near as I can remember.
Q. Where were you when you saw one of them?
A. I don't know.
Q. You can't remember where you were when you saw any one of them?
A. No sir.
Q. You don't remember the incident, you don't remember the fact really of seeing one of them at all.
A. I have seen them all.
884 Q. All that you can say is that you have seen them all, but you can't locate any place that you saw one of them.
A. No sir.
Q. Nor when you saw any one of them.
A. No sir.
Q. You wasn't a subscriber of either one of those papers?
A. No sir.
Q. You didn't take any of those home and keep them there?
A. No sir.
Q. And didn't take them and keep them in your bank?
A. Well I did have some in the bank, yes sir.
Q. When was that?
A. I couldn't remember.
Q. And have you got them now?
A. No sir.
Q. What did you do with them?
A. Them what I kept, as near as I can remember, I handed them to Biggs and Thomas.
Q. The newspapers?
A. No just the statements.
Q. Do you know what statements you handed to them?
A. Couldn't tell couldn't remember.
Q. Can you pick out any one of these reports now, can you name any one of them, or give any date to any one of them that you saw?
A. No sir, I couldn't.
Q. And you don't know who signed any one of them do you?
A. I remember the names yes sir.
Q. Tell me the names that were signed to one of them?

885 A. D. E. Thompson, Stuart, Hamer and Yates. I think I have seen Holmes name on too.

Q. On one report?

A. No I wouldn't say that, but I have seen them names on the several reports?

Q. You are sure of that are you?

A. Yes sir.

Q. See anybody's else name?

A. I have seen Mosher's and Outcalt's.

Q. Can you point out anything that is written in any one of those statements?

A. Not as I remember.

Q. As far as you know the statements were alright?

A. Yes sir.

Q. You were better acquainted with Mosher than any of the rest of the people with the bank?

A. I couldn't say that I was, I don't suppose I would know him by sight today.

Q. Who was it you say you bought out?

A. Carmickle and Geary.

Q. Edwin Geary?

A. Yes sir.

Q. He lives in Cass county, Nebraska down here?

A. I don't know where he is.

Q. Did you make any inquiry of them about continuing your account in the Capital National Bank?

A. No sir.

Q. How did you know that their account was kept there when you bought in?

A. The books showed it.

886 Q. And did you make any further inquiry about the matter, or inquire of anybody about continuing your account there?

A. I did in a general way.

Q. Who did you talk to?

A. I couldn't remember now. I have heard about the standing of the people, that is about as far as I remember just now.

Q. From business men in Staplehurst?

A. No sir.

Q. In Lincoln?

A. In Lincoln.

Q. When you went to Lincoln did you make inquiry of people there?

A. I did.

Q. Were you acquainted with anybody in Lincoln?

A. Yes sir.

Q. Did Geary live there then?

A. No I didn't take any stock in Geary.

Q. He went to Cass county.

A. I don't know where he went, he left in a hurry.

Q. Did you find his bank, you didn't find any trouble in his bank did you?
A. Yes sir.
Q. After you bought it you ran your bank straight of course?
A. The best I could yes sir, the best I understood it.
Q. From what you learned by inquiry and what you learned of the standing of the officers and directors of the Capital National Bank everything seemed to be favorable, did it?
A. Yes sir.
887 Q. You didn't change your account to any other place?
A. No sir.
Q. Just continued it right on where your predecessor had started.
A. Yes sir.
Q. Now when you first went into the bank who was the President of your bank?
A. Mr. Jorganson.
Q. And you were Cashier?
A. Yes sir.
Q. And you kept the books?
A. Yes sir.
Q. And you did the corresponding back and forth, with other banks?
A. Yes sir.
Q. And the Capital National Bank. And when you wanted to draw money from there you would write out drafts and write the letters and receive responses etc., in your position as Cashier?
A. Yes sir.
Q. And you remained Cashier,—in that work there until 1893 until you became President?
A. No it was in 1894 when I became President.
Q. When you saw one of these statements, if you can remember any particular time, did you find that the liabilities of the bank on one side were as great as the assets on the other.
A. I couldn't remember any particular statement at all.
Q. Then you couldn't remember whether the liabilities were as much on one side of the statement, the debit side, as the assets were on the credit side?
A. I wouldn't state anything from memory that way.
Q. You couldn't remember whether two sides of the account seemed to balance or not?
888 A. Why they naturally would.
Q. Well they wouldn't have to, if they didn't would they?
A. No, but then,——
Q. Do you remember, do you have any recollection of whether they did or not?
A. Yes sir they did.
Q. Are you speaking that because you say they have to, or do you remember that they did?
A. I remember they did, or else I would have noticed that.
Q. Now since you remember that, do you remember where you were when you saw that?

A. No sir.
Q. And you don't know when it was?
A. No sir.
Q. You don't mean to say that H. J. Walsh was a director, do you?
A. If I remember right he was Vice President at one time.
Q. Do you remember the amount in money that you have received on this account?
A. On this account?
Q. Yes, this account that you are suing for here?
A. You mean from the Receiver?
Q. Yes, or any other source.
A. It was seventeen per cent. of the total.
Q. Do you remember the amount?
A. No sir. I could soon tell. $14,264.11 is the total debt, or claim.

Mr. DEWEESE: That is all.

889 Cross-examination.

By Mr. WHEDON:

Q. Couldn't you tell what interest you got from the Capital National Bank Mr. Jacobs?
A. I couldn't remember.
Q. Won't your books show?
A. I don't know.
Q. Just look at that and find it please.
A. If it was, it was turned in the earnings and profits, there was no separate item of it, I remember that, but the statement of the bank would show it.
Q. Won't your books show what rate of interest you got from the Capital National Bank, on your deposits?
A. No sir.
Q. Did you get eight per cent.?
A. I don't remember what I got.
Q. Did you ever get as much as eight per cent.?
A. Not as I remember.
Q. Seven?
A. I couldn't remember.
Q. What would you say would be your best recollection, that you did not get that?
A. I got some.
Q. What is your best recollection did you ever get as much as seven per cent.?
A. Not as I remember.
Q. Did you ever get as much as six?
A. I couldn't remember.
890 Q. Did you get interest on your money that you had on deposit in the Chemical National?
A. No sir.
Q. But you did get interests on deposits in the Capital National?

A. We got some there, yes sir.
Q. Was that on your Daily Balance or monthly balance?
A. I know it was added up when we had the monthly statement between each other.
Q. Have you got those monthly statements?
A. Not here, no sir.
Q. Have you got them at the bank?
A. I believe so.
Q. Then can you refresh your recollection so that you can state what rate of interest you got, from these statements.
A. I could, yes.
Q. I wish you would do that.
A. Yes sir.
Q. You say you saw the call that was published?
A. Yes sir.
Q. How many of those calls did you see each year, do you remember?
A. I wouldn't state for certain, I believe five.
Q. Those were signed by the Comptroller, these calls?
A. No.
Q. Who were they signed by?
A. They were just short statements in the paper, that there was a call made, as near as I can remember.
Q. What paper did you see that in?
A. I couldn't remember.
891 Q. What paper was taken in the bank?
A. I just seen that now, when I took this book, just like I showed you a moment ago, we got the World Herald, November 15th.
Q. Then the World Herald was the paper that was taken in the bank?
A. Part of the time, I wouldn't say how long.
Q. How long would you say that paper was taken?
A. I couldn't tell.
Q. That was the only paper that was taken in the bank was that, World Herald?
A. Yes sir, the World Herald.
Q. Now you say these statements that you saw showed the bank alright and safe?
A. Yes sir.
Q. Did that statement purport to give the amount of assets and recources of the bank, of the Capital National Bank?
A. The published statement?
Q. Yes sir.
A. Yes sir.
Q. Did it give their value?
A. The value of the resources?
Q. Yes sir.
A. Just the amount.
Q. That was money and resources. Did it give the amount of notes that it held, did it?

A. Yes sir.
Q. Did not purport to give their value?
A. No sir.
Q. And do you remember whether among the resources it gave the taxes paid, the amount of taxes paid?
A. I haven't paid much attention to that.
892 Q. Didn't read these statements very carefully?
A. Yes sir.
Q. But you don't remember what they contained.
A. I don't remember the separate items no sir.
Q. Do you remember any other items than the amount of discounts?
A. Loans and discounts, not any certain items, no sir.
Q. Nor their value. You don't remember any other items than loans and discounts?
A. I know there was other items stated, but I couldn't tell the amount of any of them.
Q. Now do you remember whether these reports that were made were all made on the same form, those reports that you say?
A. Nearly, I think.
Q. Practically all on the same form.
A. Yes sir.
Q. You couldn't tell how many you saw?
A. No sir.
Q. Nor when you saw them?
A. Not the correct time, no sir.
Q. The only items that you can give would be the loans and discounts?
A. I don't remember the amount either, no sir.
Q. You remember the fact that it did give them, don't you?
A. I remember that it gave all of the different items, what a statement like that should contain.
Q. Well what would they?
A. Well I don't remember the different amounts.
Q. I didn't ask for the amounts, I asked if you remember the different items?
A. What they were called.
893 Q. Yes sir.
A. Loans and Discounts, or Bills Receivable or whatever,—Loans and Discounts I guess they were called mostly. Then the amount "due from banks" Capital Stock. Cash on hand, were most of the items of resources.
Q. Those were most of the items of resources as you recollect them now?
A. Yes sir.

Mr. WHEDON: I guess that is all.

Redirect examination.

By Mr. THOMAS:

Q. During the time that you have been engaged in the banking business have you been engaged in any other business?

A. Yes sir.
Q. What other business?
A. I have been in the grain business, right along, and part of the time in the stock business, shipping hogs.
Q. Who have you been associated with in that business?
A. In the grain business I have been associated with P. C. Nelson, and in the stock business with Hartman & Dunn.
Q. And you may state if they took these Lincoln papers you spoke of during the time you have been in the banking business?
A. Hartman & Dun as near as I can remember took them.
Q. And did you see the papers they took?
A. I have seen the papers yes sir, the statements.
Q. What do you refer to as the notice of the Comptroller calling for these statements, do you refer to a news item, or dispatch published in the paper announcing that such a call had been
894 made or is it the formal call that the Comptroller signed?
A. It was just the news item.
Q. Now you spoke of having kept some of those statements that were in the papers, what did you do with those?
A. I turned them over to Biggs & Thomas.
Q. Which one of the firm of Biggs & Thomas?
A. Biggs.
Q. Do you remember how long ago that has been?
A. No I don't.
895 Q. With reference to the commencement of this suit, was it before or after?
A. It was after the commencement of this suit.
Q. How long, about?
A. Shortly after, I couldn't tell the time.
Q. And do you know if Mr. Biggs is alive?
A. Yes sir.
Q. You may state whether or not he is alive?
A. He is not alive now.
Q. How long has Mr. Biggs been dead?
A. I don't know.
Q. About two or three years?
A. About two years I think.
Q. And have you seen these published statements since you delivered them to him?
A. No sir.
Q. Did you have any other statements of any kind that were sent you by the bank?
A. They sent our printed cards with a short cut of the statement on them.
896 Q. Did you keep those cards and file them away?
A. I did some, as near as I remember.
Q. Where did you put them?
A. They went with Mr. Biggs I guess.
Q. Did you keep any that Mr. Biggs did not get?
A. No sir not that I remember.

Q. Did you have any statements that you kept at the bank other than what you sent to Mr. Biggs?

A. No sir I think he got everything that he thought of any value.

Q. Were there any statements of any kind at the bank at the time your safe was blown up by burglars?

A. I think not.

Q. Now who was Vice President of the bank at the time you commenced doing business in 1886, that is the Capital National Bank?

A. If I remember right it was Mr. Walsh.

Q. H. J. Walsh?

A. I don't remember the initials.

Q. And who was Vice President at the time the bank failed?

A. I think it was Walsh.

Q. And was there anyone else Vice President of the bank during the time that the Bank of Staplehurst kept an account with the Capital National Bank?

A. I don't remember.

Q. Do you remember any one else being Vice President than Mr. Walsh during that period?

A. No sir.

897 Witness JACOBS recalled for further direct examination.

By Mr. THOMAS:

Q. Mr. Jacobs are you able to state the amount of money that the Capital National Bank owed to the Bank of Staplehurst, that is that was on deposit with it at the different times, say each month from the time in February 1886 that you commenced making deposits there, until the failure of the Capital National Bank?

A. Yes sir.

Q. Have you prepared a schedule from your books of original entry which will show correctly the amounts of money which the bank of Staplehurst had deposited in the Capital National Bank at or about the first of each month during the period heretofore referred to?

A. Yes sir.

Q. Will you produce that statement?

(Witness complies.)

Q. Is Exhibit No. 1051 which I hand you a true and correct statement compiled from your books of original entry showing the balances which the Bank of Staplehurst had on deposit in the Capital National Bank on the dates indicated on this statement, and as referred to in your former answer?

A. Yes sir.

Mr. THOMAS: We offer in evidence Exhibit No. 1051.

		Total.	Average.
1886.			
M'rch 1	426.12		
Apr. 1	816.62		
May 1	1235.84		
June 1	6385.14		
July 1	1181.56		
Aug. 2	2361.60		
Sept. 1	1837.89		
Oct. 1	230.67		
Nov. 1	630.28		
Dec. 1	477.84		
		15573.56	1557.35
1887.			
Jan. 1	1192.39		
Feb. 1	1908.62		
M'rch 1	889.84		
Apr. 1	1805.04		
May 2	583.44		
June 2	2777.05		
July 2	3816.22		
Aug. 2	6808.94		
Sept. 2	5252.52		
Oct. 1	1438.53		
Nov. 1	638.18		
Dec. 2	1835.76		
		28946.53	2412.21
1888.			
Jan. 2	1274.94		
Feb. 1	1514.04		
M'rch 2	2284.07		
Apr. 4	2824.72		
May 2	2009.35		
June 2	3522.96		
July 5	10343.47		
Aug. 2	13141.78		
Sept. 3	7720.28		
Oct. 2	7214.81		
Nov. 2	3571.74		
Dec. 1	3009.97		
		58432.13	4869.34
1889.			
Jan. 2	1038.79		
Feb. 2	1853.28		
M'rch 1	407.92		
Apr. 2		(Short 49.61)	
May 2	1230.36		
June 3	1372.21		
July 2	4915.46		
Aug. 2	2080.87		
Sept. 4	608.43		
Oct. 2	657.51		
Nov. 5	283.88		
Dec. 3	579.07		
		15627.78	1298.31
		49.61	
		15678.17	10137.21

1890.				10137.21
Jan. 2	286.25			
Feb. 3	1535.48			
Mch. 3	337.82			
Apr. 2	1677.98			
May 2	4002.93			
June 3	6474.20			
July 3	12320.94			
Aug. 2	12997.15			
Sep. 2	9289.47			
Oct. 2	3215.98			
Nov. 3	1409.65			
			53517.88	
Dec. 2		(29.97)		4469.80
1891.				
Jan. 3	273.42			
Feb. 3	1451.06			
Mch. 3	813.19			
Apr. 1	1312.54			
May 2	919.49			
June 1	7907.09			
July 2	6375.51			
Aug. 1	5698.92			
Sept. 2	1752.20			
Oct. 1	794.87			
Nov. 2	296.22			
Dec. 1	771.33			
			28665.84	2388.82
1892.				
Jan. 2	3267.59			
Feb. 1	6175.69			
Mch. 1	3818.81			
Apr. 1	4691.84			
May 2	1654.86			
Jun- 1	10111.35			
July 1	17856.88			
Aug. 1	13605.71			
Sep. 1	12085.96			
Oct. 1	10858.96			
Nov. 1	6280.89			
Dec. 1	5328.79			
1893.				
Jan. 2	4487.65			
Jan. 21	14264.11			
			114461.98	8175.84
			Average.....	3595.95

Q. Now I will ask you to state if you have compiled or prepared an abstract or statement, taken from your books of original entry which are in court, showing the amounts which the Bank of Staunton had on deposit with the Capital National Bank of Lincoln from January 2nd to January 24th, 1893?

899

A. Yes sir.

Q. Is Exhibit No. 1052 which I hand you that statement or schedule?

A. Yes sir.

Q. Is that a correct statement of the Daily Balances?

A. Yes sir.

Mr. THOMAS: We offer in evidence Exhibit No. 1052.

Q. Now I will ask you to explain Mr. Jacobs how it comes that there are entries under date of January 24th 1893?

A. That is the last settlement with the Capital National Bank after its failure.

Q. How does it come that the balances as shown by this Schedule under date of January 21st 1893 does not show the correct balance which was due the bank of Staplehurst from the Capital National Bank?

A. The difference is in that statement.

Q. You may explain that any way whatever it may be.

A. Their books showed that they had transferred $3,000.00 to New York which we had ordered previously, but it was not sent.

Mr. DEWEESE: Whose books showed that?

A. Our books and so do the Capital National Bank's books, the statement they sent us, the first statement. This is a correct statement by the Receiver.

Q. Now you may state what you did, if you ordered any money transferred?

A. I ordered three thousand dollars transferred to the Chemical National Bank of New York.

Q. When?

A. On January 16th, 1893, we had one thousand dollars transferred.

900 Q. You mean you had it transferred or ordered it transferred?

A. On January 18th one thousand dollars and on January 19th one thousand dollars?

Q. You mean you had it transferred or ordered it transferred?

A. We ordered it transferred, and they charged us up with those amounts, but they never transferred it. We didn't have no credits for them amounts in New York in the Chemical National Bank.

Q. At the time you ordered it transferred, did you give a credit on your books for that amount,—at the time you ordered the Capital National Bank to forward three thousand dollars to the Chemical National Bank of New York, did you give the Capital National Bank credit on your books for the amount you ordered transferred?

A. We charged the Chemical National, and gave the Capital National credit for them amounts.

Q. And subsequently you learned that the amount had not been transferred?

A. Had not been transferred, but had been charged against our account.

Q. Where?

A. In the Capital National Bank.

Q. I hand you Mr. Jacobs, the published notices which have been introduced in evidence, and will ask you to state whether or not these are the notices that you saw which you have referred to in your preceding testimony?

901 Q. You were present were you when the newspapers containing the notices or published notices of the report of the condition of the Capital National Bank were introduced in evidence?

A. Yes sir.

Q. Now I will ask you to state if you saw the notices that were printed in those newspapers at the time the papers were issued, the files of which were introduced in evidence in this case.

902 A. Yes sir.

Q. Now I will ask you to state what other sources of information you had other than these published reports, from which you could or did ascertain the condition of the Capital National Bank.

903–910 A. I had no other source.

Q. What information or belief did you have with reference to the financial condition of the Capital National Bank, and where was that acquired?

Q. Did you know Mr. Jacobs at any time the Bank of Staplehurst was depositing its money in the Capital National Bank, that the reports of the financial condition of the Capital National Bank as published by its officers did not correctly state the amount of Certificates of Deposit that were outstanding?

* * * * * * *

911 Q. I will ask you to state Mr. Jacobs if you had any knowledge as to the value of the assets published in these various reports, except as shown by the reports themselves.

912 A. I had no knowledge whatever, only what I gained from the published statements.

Q. Did you have any knowledge of any irregularities, if any there were in the management of the business of the Capital National Bank?

A. If I had any knowledge of any single one of these fraudulent items I would have withdrawn every cent of money as fast as I could from the Capital National Bank.

913 Mr. THOMAS: That is all.

(By Mr. WHEDON:)

Q. Did you get the rate of interest that you received?

A. I found one item, if you want to look at it. I looked that up last night.

Q. Well what rate of interest were you receiving?

A. This is all that I could find of the interest that I received from the Capital National Bank, $22.81.

Q. I will ask you what rate of interest you were receiving on your deposits?

A. I don't remember that I got any specific rate.

Q. You can't tell any more about it than you could yesterday?
A. No sir, not a bit.

Further cross-examination.

By Mr. DEWEESE:

Q. Mr. Jacobs on or prior to December 2nd, 1890 you had checked all of your money out of the Capital National Bank, had you not?
A. Yes sir.
Q. What is the first day that you had checked it all out prior to that?
A. I couldn't remember unless I looked it up, if we have at all.
914 Q. And you checked out all of your deposits and borrowed some besides?
A. Yes sir.
Q. And later on you deposited some more?
A. Yes sir.
Q. Don't you remember that on January 24th, 1890 you had checked out all of your money and had an overdraft there, that is you owed the bank some money, $62.85?
A. January 24th, Well I have got under date of the 22nd, we haven't got any overdrafts according to our books at all during that time. Yes sir, I have got January 22nd to 25th.
Q. Well during some of those dates, of course the date might not agree, between your books and theirs, what was your balance on January 22nd, 1890?
—. January 22nd, $79.54.
Q. And on January 23rd didn't you draw $112.50?
A. I couldn't tell by this book.
Q. And in the meantime you have made no ddeposit?
A. I couldn't tell unless I would look it up.
Q. That might be true?
A. That might be true.
Q. And it might be true that you drew out all at several times during 1886, 1887 and 1888 any one of those years.
A. Yes sir.
Q. In reference to your testimony this morning, do you mean to have it understood that you didn't tell the facts yesterday?
915 A. In what respect?
Q. In any respect.
A. Why I told them as near as I knew how.
Q. And what you stated yesterday was the truth as you understood it was it?
A. Yes sir.
Q. You still stick to it?
A. Yes sir.

Mr. DEWEESE: That is all.

(By Mr. THOMAS:)

Q. You may state what was the nature of your transactions withe the Capital National Bank of Lincoln, speaking as a banker?

A. In remitting money for deposits, and drawing on our account there by drafts.
Q. You issued drafts?
A. We issued drafts against our account.
Q. And was running an open account from day to day?
A. Yes sir.
Q. Were they what is known as your Lincoln correspondent?
916 A. Yes sir.
Q. I will ask you to state Mr. Jacobs the dates and the amounts of the dividends which you received, which you testified to yesterday, from the Receiver of the Capital National Bank, on the amount which that bank owed you at the time of its suspension.
A. It was received September 7th, 1893..... $1426.41
April 25th, 1894..... 713.20
February 1st, 1902..... 285.28

Mr. THOMAS: That is all.
Witness excused.

THOMAS BAILEY being called as a witness on behalf of the plaintiffs and being first duly sworn testified as follows:

Direct examination.

By Mr. R. S. NORVAL:

Q. Where do you reside?
A. Pleasant Dale, Seward County, Nebraska.
Q. How long have you resided in this county?
A. Since some time in 1869.
Q. You may state if you had any transactions with the Capital National Bank of Lincoln, Nebraska at any time in the year 1892?
A. Yes sir.
Q. You may state what they were?
A. Well I think it was in October 1892 I gave them a certificate of deposit from the First National Bank of Lincoln, Nebraska.
917 Q. What do you mean by giving them a certificate, did you make a donation to them?
A. No.
Q. Tell what your transaction was.
A. In the first place I went to the bank to see what interest they were paying before I took this out. I received notice from the First National that they wouldn't only give me five per cent. interest, and I thought this Capital National Bank was as good as the First, and they offered me six, and the consequence was I just signed the certificate of deposit over to them, and they gave me their certificate for it.
Q. Have you got the date of that?
A. I believe I have.

Q. Have you any memorandum by which you can refresh your memory?

A. October the 11th, 1892.

Q. Well how much was that?

A. Ten thousand dollars, I deposited there that day.

Q. And when did you have any other transaction with the bank, with reference to the matters involved in this suit, if any?

A. Well I deposited some more in December, December 28th, 1892.

Q. How much?

A. I think it was $2,000.00 I don't remember the exact amount.

Q. Now how many transaction did you have with the bank?

A. I think that was about all that I can remember. I drew Five Hundred dollars out January 19th, 1893.

Q. Well now you may state how you came to do business with the Capital National Bank instead of the First National Bank.

918 A. The reason was the First National, as I stated before they only wanted to give me five per cent. on my money, and I went down to the Capital National and they offered me six.

Q. How did you come to go to the Capital National Bank?

A. I went on purpose to see what they would pay on the money. And I thought it was just as good as the First National.

Q. What information did you have as to the condition of the Capital National bank?

A. As soon as I went in they handed me a card and the Directors and stockholders of the bank were on that card. And I took the papers several years previous.

Q. What papers?

A. The Semi-weekly Journal, I believe, and the Call.

Q. State what you saw in them if anything.

A. I supposed it was as good as I could do.

Q. What did you see?

A. I saw that the bank was in pretty good circumstances, as I supposed the way the amount of assets read in the published stat-ments.

Q. Well now what did you read in those papers, published stat-ments?

A. Yes in the published stat-ments in the paper.

Q. Of what bank?

A. The Capital National of Lincoln, Nebraska.

Q. You say they gave you a card of the bank on which the officers names and directors appeared?

A. Yes as soon as I come into the bank, and told them I had some money, I had in the First National Bank, and they offered me six per cent. and I thought they were just as good as the other, and I thought I would like it.

919 Q. How long before you went over to transact your business with the Capital National Bank had you read these stat-ments?

(Question withdrawn.)

Q. State when it was with reference to the time,——

A. I suppose ever since the bank started, for I read the papers every day and took particular notice. I had some money to loan out and I took a little notice where I thought was the best place to put it.

Q. And what reliance did you make if any upon these stat--ments?

A. Well that was all the reliance I had was what I could get information in the papers in regard to the standing of the bank.

Q. State what information if any, you had other than what was disclosed in the stat-ments that were published.

A. That is all the information I had. Then I knew some of the officers and I thought they was good business men.

920 Q. You knew some of the directors?

A. Yes sir.

Q. What ones?

A. I knowed Walsh.

Q. And did you know any of the others?

A. I knowed two or three of them personally. I knowed Mr. Mosher and Outcalt, and I knowed Mr. Stuart well.

Q. And did you know who were the directors of the bank as shown by their advertis-ments and card?

A. I knowed the balance by reputation.

Q. Well who were they?

A. They had Stuart, Holmes, Mr. Thompson, Hamer, Phillips, Yates and Mr. Mosher and Outcalt, was Cashier. I have known him ever since he has been in the state. I did business with him when Sweet & Brock was running a bank there?

Q. You may state Mr. Bailey if you knew anything about the condition of the bank except as was disclosed by the published stat--ments?

Q. You may state where you got your information as to the condition of this bank.

921 A. I got it out of the published stat-ments.

Q. And from any other source?

A. No sir I had no other source to get it from.

Q. You may state Mr. Bailey whether or not you would have deposited your money and transacted your business there at this bank except upon the stat-ments that you had seen and read.

922 Q. State what inducements were made and all of them that were made in order to induce you to transact your business with this bank.

A. The inducements was that they would give me one per cent. more than the First National Bank, and I thought it was just as good as where I had it, and I was getting more interest on my money.

Q. Was that all that induced you to transact your business there or was there any stat-ments made?

A. All the stat-ments that was made I read in the papers.

Q. Now which did you rely upon, the——

Q. You may state what effect those published stat-ments had

upon your transacting business with the Capital National Bank if any.

923 A. Why that is all the effect I had to go by was the published stat-ment, supposing it was to be true and correct.

Q. Did you believe it to be true?

A. I believed it to be true or I wouldn't have put my money there. I would have kept it where it was.

Q. How did you know now the reputation of these directors?

A. Well I had heard they was good men,—I knowed some of them to be good business men.

Q. Men of wealth and business sagacity?

A. Men of wealth, yes sir.

Q. How much have you received upon your indebtedness against the bank?

A. Why I think seventeen per cent.

Q. When did you receive it?

A. I received ten per cent. September 7th, 1893.

COURT: How much money?

A. It would be on $11,500. I haven't got the amount here.

Q. What was the next amount and date?

A. The next was April 26th, in 1894, 5%. And two per cent. dividend I got this year,—I don't know what day it was.

924 Q. Now you may state if you knew at any time, or had any means of knowing that the Capital National Bank was not being properly conducted, and was not financially in the condition as represented by its stat-ments?

A. I had no means of knowing.

Q. Well did you have any knowledge?

A. I had no knowledge.

Q. Did you have any knowledge that the assets of the bank were not as large as represented in its stat-ments?

A. No sir I had no means of knowing.

Q. Did you have any knowledge as to whether or not its liabilities were much greater than stated in its stat-ments.

925 A. Why no sir, I had no means of knowing.

Q. Now with reference to these report-, how many did you see, as to the condition of the bank, say two years before you commenced doing business there?

A. Why I used to read the papers regularly. When ever they would come out, about every two or three months, about four or five a year. There would be in all of the banks, I wasn't particular about that bank, but all of the banks in Lincoln, I had money there and it was to my interest to see how the published stat-ment was.

926 Q. For how many years did you read these published stat-ments?

A. Well I couldn't say that.

Q. Well about how many?

A. Oh probably ever since the bank started, I have been reading the papers every day.

Q. You took the papers right along, the Journal and Call?
A. Yes sir.
Q. Do you remember of any other directors names that were signed to these reports that you read?
A. Yes sir.
Q. Give the names.
A. Why, Mr. A. P. S. Stuart, he was one, and Holmes, I knew both of them. Hamer and Phillips and Yates, Mosher and Outcalt and Mr. Thompson's names were there. Outcalt was the Cashier of the bank.
Q. Well do you remember now in these stat-ments what was published in the stat-ments?
A. I remember they made a very good showing, it appears that the assets was about a million.
927 Q. How many of those stat-ments do you say you read every year?
A. I used to take the paper regular.
Q. How many of these stat-ments of the Capital National Bank was it you read every year?
A. I would read them all, all that was out, four or five a year.
Q. And did you read them before or after your made your deposits of this money?
A. Before. They wasn't only one stat-ment made after I put my money in there.
928 Q. Well did you read the stat-ments that had been made prior to the time that you put your money in there?
Q. State what belief if any, you put in those stat-ments prior to the time you deposited your money in the bank.
A. I believed the stat-ments to be true, or I never would have put my money in the bank, that is sure. I didn't suppose they were going to rob me out of it, or I wouldn't have put it there.

Mr. THOMAS: That is all.

929 Cross-examination.

By Mr. DEWEESE:

Q. You live at a town over near Lincoln?
A. Pleasant Dale, about thirteen miles west of Lincoln.
Q. Lincoln was your trading place, largely?
A. I was there generally nearly every day.
Q. And you became familiar with the business men and the bank etc. there where you dealt?
A. Yes sir.
Q. How long had you been loaning your money, or keeping it with the First National Bank?
A. About,—I couldn't tell you exactly but when the Capital National,—you see they consolidated with the First National and when they consolidated, they just took my money over there.
Q. The First National was Brock's.
A. It was Richard's—I used to keep money in the State Bank, that was Richards and Brocks. I forget what the name of the Bank was, I think it was the Lincoln National.

Q. When the First National was started?

A. The First National started,—they consolidated the First National bought the Lincoln National out, the way I understood it, when they bought it out, I took my money right over there.

Q. Over to the First National.

A. Yes sir.

930 Q. And that was about how many years prior to 1892?

A. Several, one two or three, I don't think it was very many. I have a record of it, but I haven't it here.

Q. And you kept your money in that bank, and held the evidence of your deposit in the shape of a Certificate of Deposit.

A. I did in the First National. I had some in the Columbia and I took that over to the First National.

Q. I am talking about your deposit in the First National, you held a Certificate of Deposit?

A. Yes sir.

Q. And that certificate drew how much interest you say?

A. Six per cent.

Q. In the First National?

A. Yes sir.

Q. And how long did it run there at six per cent.?

A. I don't remember. As long as it was in there. And they notified me that they could only pay me five.

Q. And then what did you do?

A. Then I drew it out and took it to the Capital National Bank.

Q. And if they had continued to pay you six you would have left it there?

A. Probably I would.

Q. But when they said they couldn't pay you but five, then did you first go over to the Capital National bank to find out,——

A. Yes sir.

931 Q. What did you find out.

A. That they would give me six per cent.

Q. Suppose they had said they would give you but five, would you have changed?

A. I don't know that I would.

Q. But when they raised the amount to six, you took it over.

A. Yes sir.

Q. And when you went over there to inquire, to see how much interest you could get, you say they gave you a card?

A. Yes sir.

Q. And that card had on it what?

A. The Directors.

Q. The names of the President Cashier and Directors.

A. Yes sir, I forget just exactly what was on it now, but it showed pretty good.

Q. Who did you see there?

A. I saw some of the clerks.

Q. Who gave you the card?

A. I don't know who he was, he was one of the clerks, tall slim fellow, kind of a wiggley fellow.

Q. Young?
A. I think that was his name.
Q. He was a fellow that wiggled anyhow?
A. Yes sir.
Q. He was a clerk in the bank?
A. I think he was, he was in there. There were several of them there. Outcalt wasn't there or I would have talked to him.
Q. You knew Mosher pretty well?
A. No I didn't know Mosher very well, but I had known Dick Outcalt for years.
932 Q. But Stuart was your special acquaintance?
A. Yes sir.
Q. He was a wealthy man and a pretty good financier?
A. He always appeared to be of that reputation.
Q. Everybody had confidence in the bank there?
A. Why they did.
Q. And in Mosher and Outcalt?
A. I talked to several outside people and they all appeared to have good confidence in the Capital National Bank.
Q. And in its officers and the men connected with it.
A. And in the men connected with it, yes sir.
Q. And there was no bank in Lincoln, or in the state that you knew of, that stood higher in the general estimation that it.
A. Not in my own mind according to their stat-ment. I don't think there was any in Lincoln anyway.
Q. When your money was in the First National bank, you say you noticed what was published about the banks because you had some money invested in the First National Bank?
A. How was that?
Q. When your money was in the First National bank, you say you noticed what was published about the banks because you had some money invested in the First National bank.
A. Oh, yes.
Q. You wasn't then concerned particularly about any other bank.
A. I would take notice of what I thought was a pretty good financial bank.
Q. You didn't have any reason to doubt the First National, nor any disposition to change while they were paying you 6%?
A. That's so.

933 Mr. DEWEESE: That is all.

Witness recalled for further Direct Examination:

By Mr. NORVAL:

Q. You have stated to me since coming into the court room that you desired to make a correction as to the rate of interest that you was receiving from the Capital National Bank.
A. Yes sir.
Q. If you have made any mistake in your stat-ment in that regard you may correct it.
A. I didn't make no mistake in regard to leaving it a year, but

the interest was to be, the certificate reads it was to be three, five or six, if left three, six or twelve months, now if you have got the certificates here you can prove it by that.

Mr. DEWEESE: So that the rate was six per cent. if you left it there twelve months?

A. Yes sir.

Mr. DEWEESE: And it was only five per cent. if you left it in the First National Bank for a year?

A. Yes sir.

934 Mr. FRITZ BECKARD, called as a witness on behalf of the plaintiffs and being duly sworn testified as follows:

Direct examination.

By Mr. R. S. NORVAL:

Q. Where do you reside?

A. Utica, Nebraska.

Q. How long have you resided there?

A. Since 1875.

Q. You may state if you are an officer or interested directly or otherwise in the Utica Bank, of Utica, Nebraska.

A. Yes sir.

Q. How long have you been connected with that bank?

A. Since 1883.

Q. You may state how long you have been an officer of that bank.

A. Since 1883.

935 Q. What official position do you hold in the bank?

A. President.

Q. How long have you been President of that bank?

A. Since 1883.

Q. Who has been the Manager of the Utica Bank since January 1st, 1887?

A. I have.

Q. And who was from 1883?

A. I believe I made a mistake in the dates. I guess it was 1887 since I went in there.

Q. Then you desire to correct your stat-ment that you had been an officer and President since 1883?

A. I have been an officer since 1887,

Q. And you desire to make a correction of that stat-ment?

A. Yes sir.

Q. You may state if you have done any business, your bank, the Utica Bank, with the Capital National Bank of Lincoln, Nebraska, since that time.

A. We have been doing business from the time we organized until she failed, all the time.

Q. What time in 1887?

A. January first, in 1887. It might have been the first and it might have been a couple of days afterwards, whenever we got the papers ready.

Q. Are you acquainted with any of the officers or directors of the Capital National Bank of Lincoln, and were you during the period you done business with them?

A. I know some of them when I see them.

936 Q. Did you know them by reputation?

A. Yes sir.

Q. Name the officers of the Capital National Bank.

Q. Can you state as a matter of recollection?

A. Yes. Mosher was, I couldn't tell his initials. Mosher was President, and Cutcalt was Cashier, and Walsh was Vice President and Thompson was one of the directors and Phillips was one of the directors and Walsh was one of the directors and Hamer was one of the directors and Yates was one of the directors and R. O. Phillips was one of them.

Q. Did you have any knowledge of these men, did you know their business relations?

A. I knew they was connected, from the reports I seen in the papers, they was directors or President of the Capital National Bank.

Q. You say you saw stat-ments in the papers?

A. Yes sir.

Q. What papers?

A. It's the Evening Call and the Daily State Journal.

Q. Published at Lincoln?

A. Published at Lincoln, Nebraska.

Q. How long did you see those notices, or stat-ments?

937 A. I seen them about, sometime they was published once, and would come from the Comptroller of the Currency and sometime they was published twice, they was published about five times a year.

Q. And how many of them would you see during the period you done business with them, each year?

A. I seen them all.

Q. And do you know whose names purported to be signed to those notices?

A. Yes sir.

Q. How were they signed?

A. Well they was signed by three of the directors.

A part of the time was signed by the president and verified by the President and by the Cashier, and sworn to before a Notary Public.

Q. And what did these stat-ments in a general way contain?

A. There was the liabilities. It shows how much their Capital Stock was, how much bonds and real property they had, then the assets, it shows the cash they had, like any other stat-ment, and what notes they had, and all that, like any other of these bank stat-ments.

938 Q. When did you see these stat-ments with reference to the time of your bank's doing business with the Capital National bank?

A. I seen them from 1887 until 1892 the time the bank failed.

Q. What time did the bank fail in 1892 or 1893?

A. '93 I guess, in February, if I would look at the stat-ments I can tell.

Q. Just look at your stat-ments, I want you to be sure.

A. 1893.

Q. What time in 1893, about, not the exact date.

A. The last report I got here is January 19th.

Q. Did you transact business with the Capital National Bank, your bank the Utica Bank transact business with the Capital National Bank when it failed in January 1893?

A. Yes sir.

Q. Now, what knowledge did you have of the standing, financial standing of this bank, the Capital National bank, if any, outside the published stat-ments and reports, which you saw in the pepers, which you would see, say five times a year.

A. All I got from the newspapers, what is published in there. And the stockholders was in there they was good reliable business people.

Q. Did you have any other information except what you saw in the papers?

A. No I haven't.

Q. State to the jury how you come to do business with the Capital National Bank.

A. Well the way they showed up and everything in their stat-ments and everything, it looks to be one of as good banks as was in the state.

939 Q. State whether or not you had any knowledge as to the bank's being in a financially unsound condition at the time you were transacting business with them.

A. No.

Q. Now state the nature of the business you transacted with the Capital National Bank as to whether it was an open account one of your regular correspondents or otherwise.

A. They was our regular correspondent. We kept money there and sent there for collection. We had our money forwarded there from there to our eastern correspondent. And always took bills there and every month we got a stat-ment from them in regard to it and any time they issued a stat-ment to the Comptroller of the Currency they sent us a stat-ment, and that was it in the newspapers.

Q. And did you have any other correspondent in Lincoln, banking correspondent in Lincoln with which you kept an open account?

A. No.

Q. And remitted to?

A. No.

940 Q. And why did you do business with this bank, the Capital National Bank?

A. Well it shows from all reports they make, and stat-ments, that is was as solid a bank as in Lincoln.

Q. How come you to pick this bank in preference to others?

A. Well at the time I went into the bank there I inquired into the affair and looked into the stat-ments, and I considered it about as good a bank, or the best bank they had in Lincoln.

Q. You may state if you know the amount, the balances you kept there from month to month, during the last year, if you have any way of showing that, you may state.

A. Yes sir.

Q. The last year you transacted business in 1892.

A. Yes sir.

Q. Well you may state the amount.

A. Of course I have to refer to these papers here I couldn't tell any other way.

Q. Well refresh your memory from any papers. Take January 1893 and state what you had at the time of the suspension of the bank.

A. $7,497.17.

Q. Does that correspond with your books?

A. That corresponds with our books.

Q. What was the balance you had at the close of business the last of December 1892?

A. Well this balance here, it is January 3, you see they didn't make them all out the first of the month December 3 it is. $3,998.52.

941 Q. What was it at the close of business,—at the commencement of business on December 1st?

A. It was $5270.76.

Q. And what was it at the commencement of business on November 1st, being for the month of October 1892?

A. $165.48.

Q. What was it at the commencement of business on October 1st, 1892 being for the month of September of that year, what was the balance you had?

A. $7563.05.

Q. And what was the balance shown on the first of September 1892 being for the month of August of that year?

A. $7507.63.

Q. And what was your balance on August 1st, the same being the stat-ment for the month of July 1892?

A. $4989.71.

Q. And what was it July 1st, being for the month of June 1892?

A. $8873.55.

Q. And what was it for the month of May being stat-ment rendered June 1st, 1892?

A. $7493.64.

Q. And what was it for the month of April, being the stat-ment rendered May 2nd, 1892?

A. $7429.64.

Q. And what was it for the month of March as shown by the statment made April 1st, 1892?

A. $7416.64.

Q. And what was it for the month of February being the statment made March 1st, 1892?

A. $4403.84.

942 Q. And what was it for the month of January, being the stat-ment made February 1st, 1892?

A. $2605.44.

Q. Now you may state if your balances for the preceding years ran in about the same way.

A. They are pretty near the same.

Q. What amount was the Capital National Bank owing you at the suspension of business on January 23rd, 1893?

A. $7497.17.

Q. Have they paid you any portion of that?

A. Yes sir.

Q. What amount, and when, and by whom?

A. September 1st, 1893 ten per cent.

Q. Give the amount of that?

A. April 26th, five per cent.

Q. On the face amount?

A. On the face amount. And June 10th, 1901 two per cent.

Q. From whom did you receive that?

A. From the Comptroller of the Currency in Washington. No we got an order from the Receiver of the Capital National Bank, we got an order on the Comptroller of the Currency and we had to send it in to Washington to get our money.

Mr. NORVAL: That is all.

Cross-examination.

By Mr. DEWEESE:

Q. How long have you lived in Utica?

A. Since 1875 of 1874, something like that, I couldn't tell exactly.

943 Q. What was your business?

A. Lumber business first.

A. And what business were you in in '83 and '84 and '85?

A. In 1883 I was in the lumber business yet.

Q. When did you first go into the bank?

A. In 1887. I made a mistake at first.

Q. Who had been running the bank before that?

A. A person by the name of Tom Bryant, and two others.

Q. And did you buy them out?

A. I didn't bought them out, they wasn't incorporated. They run a private bank, and so we incorporated, and Higgart stayed in and Tom Bryant stayed in, and we incorporated and a fellow by the name of Jones went in with me, and then we incorporated. And then we started up the Utica Bank.

Q. Was it Jones of the Jones National Bank here at Seward?

A. No sir.

Q. Then what position did you take when it was incorporated?

A. President.

Q. And did you have a board of directors?

A. Yes sir.

Q. Who were they?

A. That was Joe Jones, Ed Hibbard. I couldn't tell without looking at the books, the old books, I haven't them here.

Q. Before this bank was incorporated did it have an account with the Capital National Bank?

A. Yes sir.

Q. How long had they had their account do you know?

A. I couldn't tell without I had the old books here. I could tell if I had them here. I guess they had an account there since they have been doing business.

944 Q. Since the Capital Bank started at Lincoln?

A. Yes.

Q. That was in 1883 or 1884?

A. Somewheres around there.

Q. And when you incorporated you just continued your account right along?

A. Yes we just continued our account right along.

Q. Were you interested in the bank before it was incorporated?

A. No.

Q. That is the time you put your money in, and became an officer?

A. Yes sir.

Q. You said you made some inquiry when you went in about the Capital National Bank, what inquiry did you make?

A. I asked our Cashier, and well he says "here is the stat-ments" he says "of the Capital National Bank in Lincoln" he says "here's their standing and their reports," and he says "well" he says "the reports is good enough and I guess it is al- right," and we got them right along and looked at them and our account was al- right.

Q. Can you tell me why when you were making that stat-ment you kept smiling and looking at Mr. Norval so much?

A. No, I don't know, I can't help laughing, I am good natured, and can't help it.

Q. Its funny that the stat-ments come out just that way, isn't it?

A. What stat-ments?

Q. Those you have just made.

945 A. Well it is so. I had my money in there, I had twelve thousand dollars in there, and I was going to put it somewhere so I thought it was safe, so I wasn't going to lose it.

Q. Well what did you ask,—who was the Cashier?

A. Tom Bryant.

Q. What did you ask him for?

A. I just went in there because I wasn't familiar with the bank business, and I was looking the amounts over, and seeing where they kept their money, of course we couldn't keep it all at home.

Q. Have you got any stat-ments of that kind?

A. What kind?

Q. That you say he talked about.

A. I seen it, it was them stat-ments they published and they was sent to all banks, it is sent to all acorrespondents.

Q. Published in what?

A. Som-times published in the paper, and sometimes they sent them in special correspondence. It is usually in the Lincoln Daily Journal.

Q. Did you take the Journal?
A. Yes sir.
Q. A good republican paper isn't it?
A. Oh yes.
Q. Well the money that you put in when this bank was incorporated went into the bank at Utica?
A. Went in the Utica bank.
Q. Did that bank have any accounts with any other banks in the state?
A. Had some at New York, and Chicago, I guess.
Q. *A*. And in this state?
946 A. No, not at that time.
Q. The account had been there for some years, and it was just continued right along?
A. Just continued on.
Q. And do you know how much money you had on hand in there in 1887 when you started that your bank had?
A. No I couldn't tell without looking at the books, and I haven't got the books here.
Q. You didn't see any reason when you came into the bank for changing what the bank had been doing, in reference to depositing the money?
A. No, I didn't.
Q. Did you examine into the First National Bank of Lincoln, or any other bank in Nebraska?
A. I seen their stat-ments and one of them showed up as good as another, and so it was no use to keep changing.
Q. There was nothing in any of the stat-ments saying anything about solvency or insolvency?
A. No it showed on the face of them they was in fine financial good condition.
Q. Isn't it a fact that the liabilities of the bank were just as big as the resources in the stat-ment?
A. It showed it on the paper that way.
Q. This account that was in the bank there when you went in, that is the account that was in the Capital Bank, when you became President of the Utica Bank, and became interested in the Utica Bank, changing from time to time did it not?
A. Yes sir.
Q. Sometimes you checked it all out didn't you?
A. No I guess I never checked it all out.
947 Q. Are you sure of that?
A. Yes sir.
Q. Do you remember anything about it?
A. Well, I ought to know. If we had any overdrafts there they would soon let us know, they would soon be protested.
Q. Didn't you borrow money of the Capital National Bank at any time?
A. We might borrowed some and might not. I couldn't tell without looking at the books.
Q. Do you know how much of a balance you had there in October 1892?

A. Yes sir.
Q. How much?
A. Well I couldn't tell by memory, you have to give me the paper.
Q. I asked you if you remembered without looking at the books, to know.
A. I couldn't remember without looking at the books.
Q. Don't you remember you had checked it all out then except $165.48?
A. I guess that is right.
Q. What interest were they paying you for your deposits there, on balances?
A. The interest don't tell on that sheet there.
Q. But don't you remember what interest you were receiving?
A. It was either one or two per cent., I couldn't tell without——
Q. One or two per cent. a month?
A. Not a month, no. Yearly. I tell you we don't figure interest by the month, we figure it by the year.
948 Q. What are those you are examining?
A. They are the credits.
Q. Is the interest shown on them, I want to know if it wasn't seven or eight per cent.?
A. No it ain't, I can swear to that.
Q. Did you get any interest?
A. I believe we got some, but all we got is about one or two per cent., I know that.
Q. You remember you did get interest on your balances of some amount?
A. Some amounts yes sir.
Q. But you don't remember exactly how much it was, do you find anything there about it?
A. No, there is just one item of $5.02 here.

Mr. DEWEESE: That is all.

Redirect examination.

By Mr. NORVAL:

Q. If you got any interest, what rate would it be per annum?
A. They make a rule, there is some of them they have to keep two thousand dollars there or they won't get any interest and some of them if they keep one thousand there, then they get one or two per cent.
Q. Per annum or per month?
A. Per annum.
Q. You stated in your cross examination that this bank you bought out there, prior to the time you purchased it, it was run in the name of the State Bank of Utica.
A. No, Utica Bank.
949 Q. It wasn't incorporated before you went in?
A. No I guess it wasn't incorporated,—I don't believe it was.

Witness excused.

Mr. NORVAL: On behalf of the Utica Bank, we offer in evidence Exhibit No. 1053.

Mr. DEWEE: The defendants Thompson, Yates and the estate of Walsh and Hamer each separately object as incompetent, irrelevant and immaterial.

Objection overruled.

The defendants named each separately except.

Mr. WHEDON: The defendants Mosher and Outcalt each separately object as incompetent, irrelevant and immaterial.

Objection overruled.

The defendants Mosher and Outcalt each separately except.

Exhibit No. 1053, received and read in evidence as follows:

950 H. J. WHITMORE, recalled.

Direct examination.

By Mr. THOMAS:

Q. I believe the last time you were on the witness stand you had not examined or compared the account of the Capital National Bank and certain items shown with the Chemical National Bank to see whether they reconcile. I will ask you now if you have examined the books of the Capital National Bank for the month of December 1885. I think that is wherein it shows a charge of $20,300.00 to the Chemical National with Exhibit "D" attached to the deposition of Ayres and Bigelow of New York city, to ascertain whether the books of the Chemical National contain a credit of that amount $20,300.00 that is I mean a credit to the Capital National Bank.

A. I have examined the books of the Capital National Bank and also the exhibits attached to the deposition.

Q. That exhibit D contains the items which purport to be for December 1885 and January 1886?

A. Yes sir.

Q. What is the result of that comparison and attempt at reconciliation?

951–959 Q. With what account of the books of the Capital National Bank did you compare these exhibit- or this exhibit D?

A. The account for December 1885 and January 1886 on the books of the Capital National Bank with the Chemical National Bank.

Q. Now you may state the result of that comparison.

A. I am unable to find that the Chemical National Bank, during December and January credited the Capital National Bank with the item of $20,300.00 charged on the books of the Capital National Bank, December 28th, 1885.

* * * * * * *

960 Q. Have you examined the books of the Receiver to ascertain what notes are shown by the Receiver that are not indicated in the schedule, which you have prepared, and which has just been introduced in evidence?

A. Yes sir.

Q. Now you may state what notes they are.

961 Q. That is I mean by that to explain the discrepancy between the amounts as shown on this schedule, and the amount in the hands of the Receiver.

Mr. DEWEESE: Not shown by the books of the bank?

A. Yes sir.

Q. I do not refer exclusively to notes not shown on the books of the bank, but to notes in general, which has not been paid, or at least were still outstanding as an obligation of the bank.

A. There were $17,500.00 of the paper of the Western Manufacturing Company, that appears on the books of the Receiver, which on the books of the bank is shown to have been paid, that is it is marked as paid. Then there are $42,500.00 of the same paper shown on the Receiver's books which do not appear on the books of the bank at all. I have not been able to find the numbers, some of the numbers impossible numbers, and some of the notes are not listed at all, so they do not enter into the bank's account of the notes listed in the discount register, nor entered in the journal

962 Q. Is this item of $235,000.00 Western Manufacturing Company notes included in the total amount of Bills Receivable which the Receiver shows by his books, and came into his hands as a part of the assets of the Capital Bank?

A. Yes sir.

Q. You may state what further discrepancies you find if any, between the Bills Receivable which were shown on the bank's books, and those which came into the hands of the Receiver, as shown by the Receiver's books.

963-967 A. The Receiver's books shows a list of notes amounting to $9,780.65 which upon the bank's books have been marked paid. The Receiver's books also show $75,900.00 of other rediscounts that is re-discounts other than those of the Western Manufacturing Company, which do not appear upon the books of the bank, so far as I am able to discover, some of them without numbers. All together the Receiver has listed a total of $145,680.65 in Bills Receivable which have either been marked paid, on the books of the bank or do not appear upon the books of the bank at all.

* * * * * * *

968 Q. I will ask you if on the 15th of June 1892, the books indicate or show that any certificates were charged off, or marked paid on that day?

A. The books show the payment of certain certificates.

Q. You may state what certificates are shown paid that day, and what charges if any appear with reference to any Bills Receivable of the bank as disclosed by the books, on that same day.

A. C/D #26167——

Q. What does C/D mean?

A. Certificate of deposit. For $10,000.00, No. 26168 for $5,000.00,—No. 26187 for $12,136.65,—No. 26198 for $13,-

969 886.83. No. 26206 for $16,929.70,—No. 26273 for $15,-000.00, total $72,953.18 are marked paid.

COURT: Are entered as paid?

A. Yes sir, and are marked paid on the register, entered on the ledger account as paid. On the same day Bills Receivable are credited with a lump sum marked C/D the abbrevation for Certificate of Deposit of $57,953.18 and re-discounts are credited with $15,000.00 making a total of $72,953.18. The credit to Bills Receivable does not specify any bills that were paid, and there is nothing to indicate that any bills were included in this amount, simply a reduction of that amount from the amount of Bills carried on the books of the bank.

Mr. THOMAS: That is all.

Cross-examination.

By Mr. DEWEESE:

Q. That is the entry purports to be payment of so much Bills Receivable and then the payment of so much certificates of deposit that the bank has issued.

A. Yes sir.

Q. There is nothing wrong with that, is there, if it had been done?

A. Why if the bank had received payment for fifty seven thousand dollars of Bills Receivable, why of course there would be nothing wrong.

Q. You are not able to state that it did not are you?

A. I think I am prepared to say that they did not receive that payment.

Q. How do you know?

A. From the entry on the books.

Q. What does the entry say?

A. C/D $57,953.18.

970–973 Q. And that is all it says.

A. Yes sir.

Q. You think by that there was no Bills Receivable collected or paid that day?

A. Yes sir.

Q. And just on that basis alone is all that you have to hand your stat-ment on is it?

A. Well the books show that on that day there were two or three notes paid, they are listed on the Journal the number and amount.

A. And because these were not listed you think they were not paid?

A. Yes, I am satisfied that there were no notes paid.

* * * * * * *

974 Mr. H. T. JONES, being called as a witness on behalf of the plaintiffs, and being first duly sworn testified as follows:—

Direct examination.

By Mr. THOMAS:

Q. You may state your name?

A. H. T. Jones.

Q. How long have you lived in Seward County?
A. Since July 1873.
Q. What has been your business or occupation during that time.
A. For the last seventeen years, or thereabouts, the banking business principally.
Q. With what bank have you been connected if any?
A. The Jones National Bank, of Seward Nebraska.
Q. In what capactiy?
A. Cashier and President.
Q. During what period were you Cashier?
A. From the organization of the bank in November 1883, I was Cashier up to, I think January 1890. Since that time I have been president.
Q. Prior to the time you were president, and while you were Cashier, who had active charge and control of the bank and conducted its business?
A. I have principally, always.
Q. Did the Jones National Bank do business, or keep any moneys on deposit in the Capital National Bank, or Lincoln, Nebraska?
A. It did.
975 Q. When did it commence doing business with that bank?
A. Somewhere in 1885, I believe.
Q. And how long did the Jones National Bank continue to do business with the Capital National Bank?
A. Up until the time it suspended, January 21st 1893.
Q. What was the nature of the business transactions between the two banks?
A. Why we kept what you would term an account with them, deposited with them.
Q. Was the Capital National Bank your Lincoln correspondent as it is termed in banking.
A. Yes sir.
Q. Do you know the amount of money the Jones National Bank had on deposit with the Capital National Bank and which the Capital National Bank was owing the Jones National Bank on the 21st day of January 1893?
A. Our books showed $12,529.23 but the facts were that they were owing us $17,529.23 on account of a $5,000.00 remittance I had ordered them to make, and sent them the money, and they reported to me that they had, but they never did.
Q. What was that remittance you ordered them to make?
A. $5,000 to the Chemical National Bank of New York city.
Q. And did the Capital National Bank report to you that that amount had been remitted to the Chemical National Bank, for the Jones National Bank?
A. It did on the 16th day of January 1893.
Q. I hand you exhibit No. 1054 and will ask you from whom that was received and where you received it?
A. It was received in the regular course of business, by mail,

from the Capital National Bank, a postal card in the hand
976 writing of Col. Hale.

Q. What does the writing on that postal card indicate, what does it mean?

A. That they have remitted for our account, New York, $5,000.

Q. Is that the item to which you referred in your previous answers, the one which you had ordered transferred to the Chemical National and which the Capital National had not remitted?

A. It is.

Q. And does that item account for the difference between the amount as shown by your books, which they owed you, and the amount which they actually owed you?

A. It does.

A. At the time you ordered this money forwarded or transferred by the Capital National Bank to the Chemical National bank, did you give the Capital National Bank of Lincoln credit on your books for the $5,000?

A. Yes sir.

Mr. THOMAS: We offer in evidence Exhibit No. 1054.

No objections.

Exhibit No. 1054 received and read in evidence as follows:—

Addressed:—Jones National Bank, Seward Nebraska.

[Lincoln, Nebr., Jan. 17, 1.30 a. m., '93.]

C. W. Mosher, President. H. J. Walsh, Vice Pres. R. C. Outcalt, Cashier.

Capital National Bank.

LINCOLN, *Nebraska,* 1/16, 1893.

Yours of — Received with enclosures as stated.

Credited	Entered for collection	We remit
1009		New York.... $5000
		Chicago
		Omaha
	Ex. 1054. OPH	Currency
		Silver

This bank in receiving collections, elsewhere than in Lincoln, acts only as your agent and assumes no responsibility beyond that of due diligence on its part.

Yours respectfully, R. C. OUTCALT, *Cashier.*

977 Q. I believe you stated you had been doing business with the Capital National Bank since 1885. Now I will ask you if during the time the Jones National Bank was doing business with the Capital National Bank, you saw any of the published stat-ments of the financial condition of the Capital National Bank?

A. I did.

Q. You may state in a general way when you saw these published

reports referred to with reference to the time of your doing business with the Capital National Bank.

A. As soon as published and the mails would arrive here from Lincoln.

Q. How frequently were these reports published, referring to the notices of the financial condition of the Capital National Bank?

A. Five times each and every year.

Q. And these notices that you saw where were they published?

A. They were published, printed in the Lincoln State Journal and a number of them in the Call.

978 Q. What Call do you mean, The Lincoln Evening Call, was it?

A. It was a paper generally known as the Call. I don't know whether you call it the Lincoln Call.

Q. Where was it published?

A. At Lincoln, Nebraska, Daily Call, I guess.

Q. Do you know whether or not all the notices that were published by the Capital National Bank showing its financial condition from the time that the Jones National Bank did business with the Capital National Bank, were seen by you?

A. Yes I think I saw every one of them. It was the custom of the bank then as it is of banks today to have stat-ments printed on either a card or a slip of paper and then mail them to all customers or people who they desired to do business with.

Q. Did you see the stat-ments of their financial condition that were published in the Lincoln State Journal, and the Call?

A. Yes sir.

Q. Did you read them over or examine them?

979 A. Yes sir.

Q. Referring to the issues of the Lincoln Journal and the Daily Call, which have been introduced in evidence, and which contained published stat-ments of the condition of the Capital National Bank, at different times, I will ask you if you saw the notices that were published in these papers to which I have just referred?

A. I think I answered that question, that I did before.

Q. (Last question repeated.)

A. I did.

980 Q. Now I will ask you if you were acquainted, or know who were the Directors of the Capital National Bank during the time your bank did business with it, and deposited money with it?

A. I do.

Q. Were you acquainted with their reputation and standing in the business and financial world.

A. Yes sir.

Q. You may state what that was.

A. The majority of them was good.

Q. What was the reputation, state more fully, with reference to whether they were men of ability or otherwise or men of means or otherwise.

A. They were men of means, and they were business men. Men

connected with large business institutions in Lincoln and in handling and loaning money.

Q. Had you any other information concerning the condition of the Capital National Bank, during the time the Jones National Bank did business with it other than what you have testified to?

A. Their stat-ments were the principal thing that all business men rely upon. That is what they are made for.

Q. Had you any other means of information than the stat-ments?

A. No other means as to the standing of the bank whatever, any more than the names signed to the stat-ments lend to a stat-ment.

Q. Did they lend to the stat-ments in your mind?

A. They certainly did.

Q. In what way?

A. Because I knew they were business men, and when you receive a stat-ment from a business man, you have got a right to rely upon it, you think it is a fact. A business man isn't supposed to put his name to anything that is not true.

981 Q. Did you rely upon those stat-ments?

A. I certainly did.

Q. Do you remember now who some of the directors of the Capital National Bank were?

A. Yes sir.

Q. You may state some of them.

A. C. W. Mosher, President, R. C. Outcalt, Cashier, and Homen J. Walsh, Vice President. And D. E Thompson, R. O. Phillips, A. P. S. Stuart, W. W. Holmes, during his lifetime. Yates, Dr. Hamer,—that is all I remember now.

Q. Did you state that Mr. Walsh was a director?

A. I did, he was director and Vice President.

Q. You may state if you had any knowledge in regard to any of the discrepancies between the books of the National Capital Bank and its actual condition during the time the Jones National Bank did business with it.

A. I did not.

Q. Did you know that it had certificates of deposit outstanding which were not shown, or were under stated on its books?

A. No sir, I did not. I was not aware of any irregularities, or any crooked work until after the failure of the bank.

Q. If you had known of these matters would it have effected the business of the Jones National Bank with the Capital National Bank?

A. I would have withdrawn every dollar out of there, if I had known there had been any crooked work.

Q. I hand you Exhibit No. 1055 and will ask you to state when and from whom you received that postal card.

982 A. I received that postal card in the regular course of business by mail from the Capital National Bank.

Q. About what time?

A. About the 19th day of January 1893.

Q. You may state if you know what the writing on the back of that indicates.

A. That is $5,000 in gold that I sent them by express.
Q. On the 19th day of January 1893?
A. Yes sir.
Q. Do you remember what that was sent for, how it come to be sent?
A. Because they had remitted according to my order five thousand dollars to New York City.
Q. That is they reported they had remitted?
A. Yes sir.
Q. And was this gold sent to them in response to the notice exhibit No. 1054 notifying you that they had forwarded to the Chemical National Bank of New York for the credit of your bank five thousand dollars?
A. Yes sir.
Q. And did they ever forward or transfer any money this five thousand dollars referred to in this postal card, to the Chemical National Bank of New York for the credit of your bank?
A. No sir, they never sent a cent to them.

Mr. THOMAS: We offer in evidence Exhibit No. 1055.
No objection. Ex. No. 1055 received and read, as follows:

983 Address, Jones National Bank, Seward, Nebraska.

[Lincoln, Nebraska. Jan. 19, 5.30 p. m., '93.]

C. W. Mosher, Pres. H. J. Walsh, Vice-Pres. R. C. Outcalt, Cashier.

Capital National Bank.

LINCOLN, NEBR., 1/19, 1893.

Yours of 1/19 received, with enclosures as stated.

Credited	Entered for Collection	We Remit.	
5000	Gold	New York	$—
		Chicago	$—
		Omaha	$—
	Ex. 1055 OPH.	Currency	$—
		Silver	$—

This bank, in receiving collections elsewhere than in Lincoln, acts only as your agent and assumes no responsibility beyond that of due diligence on its part.

Yours respectfully, R. C. OUTCALT, *Cashier.*

Q. Now has the Jones National Bank, or you for it, received any part of the $17,529.23 which the Jones National Bank had on deposit in the Capital National Bank at the time of its suspension and if so state the facts, state the amounts and the dates paid, and from whom received.
A. There has been three dividends. The first dividend was ten per cent., that was in August 1893. The second dividend was five per cent. Now then the third dividend was two per cent. The dates of the payments of those last two I am not certain of. This

receiver's certificate is not the last one I had. There is another one, that has got them both on. The original was lost for a while and they issued a duplicate and the duplicate has the dates of the last two stamped on.

Q. Well about when was it, the second one about May 2nd, 1894?

A. Yes sir.

Q. And the third one about July 15th, 1901?

984 A. Yes sir.

Q. And is that all the bank has received on that account?

A. Yes sir.

Q. Are you acquainted with the methods of keeping books in banks?

A. Somewhat yes sir.

Q. What experience have you had in that line?

A. I have been in the banking business since 1883.

Q. I will ask you if you have made any examination of the books documents and papers of the Capital National Bank, since its failure?

A. I have at various times.

Q. Now state when you first made such an examination?

A. The first time I examined the books after the failure was on the 23rd day of January 1893.

985 Q. Where were the books at that time?

A. They were in the Capital National Bank.

Q. Where did you examine them the next time after that?

A. I was down the following Wednesday?

Q. I asked you where the next time?

A. In the Capital National bank building.

Q. That is in the building in which the bank had been doing business prior to its suspension.

A. Yes sir.

Q. Who was in charge of the books at that time?

A. Mr. Griffith, National Bank examiner.

Q. When did you next examine them?

A. Why I examined the books several times, while they were in his custody and the next time when they were in the possession of Kent K. Hayden.

Q. The Receiver of the bank?

A. Yes sir.

Q. Did you make an extended examination of them while they were in the possession of Mr. Hayden?

A. Yes sir. I went over about everything they had.

Q. Did you have access to and examine the books after the death of Mr. Hayden, and while they were in the possession of Mr. McDonald the receiver who succeeded Mr. Hayden?

A. I did.

Q. When did you first have access to and examine them after Mr. Hayden's death?

A. Why a few months after McDonald was appointed Receiver.

Q. And did you spend very much time on them at that time?

A. Why a number of days.

986 Q. Did you have an expert or an accountant of any kind to assist you in the examination at that time?

A. I did to a certain extent.

Q. Who was that?

A. W. A. Bartley of Lincoln, and J. J. Thomas of Seward.

Q. How long did you have access to the books at that time, and examine them?

A. About three weeks.

Q. And have you examined the books since that time?

A. I have.

Q. When?

A. Within the past few months.

Q. How much time about have you devoted to the books during the past year?

A. Why about three weeks, but it has all been within the past, why since the last term of court, when was that,—in March?

Q. You may state how much time you think you have devoted to examining the books, documents and papers of the Capital National Bank since its failure?

A. Oh, in the neighborhood of six months all together.

Q. I will ask you if in your examination you examined certificates of deposit which had been issued by the bank during its existence and which were in the custody of the Receiver?

A. Yes sir.

Q. I hand you Exhibit No. 1056 and will ask you if you know what that is?

A. I do.

Q. You may state what it is.

A. That is a photograph of a certificate of deposit No. 17969 issued by the Capital National Bank.

987 Q. Did you ever see the original?

A. Yes sir, several times.

Q. You may state whether you know whether or not that is a correct and exact photographic reproduction of the original which you say you have seen several times.

A. It is.

Q. Where was the original when you first saw it?

A. In the hands of Receiver Hayden.

Q. And when you last saw it, where was it, in whose possession?

A. In receiver McDonald's.

Q. When was that as near as you can remember?

A. It was about two years ago or such a matter.

Q. Do you know where the original is?

A. I do not.

Q. You were in the city of Lincoln at the time the deposition of Mr. McDonald was first taken, in which he was asked to produce certain certificates of deposit?

A. I was.

Q. You may state if you remember whether he was asked to pro-

duce the certificate of which Exhibit No. 1056 is a photographic copy?

A. Yes sir he was.

Q. Do you remember if he produced it?

A. No sir, he said he didn't have any such a certificate.

Q. And did he, or did you make search for the certificate?

A. At the time?

Q. Yes at that time or since.

A. Why he went and made a search and came back and reported he couldn't find it. And I searched for it afterwards, I didn't find it but I found other certificates that were called for that day, and he couldn't find.

988 Q. Where have the books, documents and papers of the Capital National Bank been kept, since Mr. McDonald has been receiver up to the time of this trial.

A. After he took charge of them, they h-ve been kept in what is known as his vault and the old Savings Bank vault,—which is in the same building but not in the same room.

Q. Are these vaults the ones in which search was made?

A. Yes sir.

Q. Did you notice the signature to the original certificate, of which this is a copy, and the handwriting in the body of it?

A. Yes sir, it is all written by one fellow.

Q. Do you know in whose handwriting it is?

A. Yes, in C. W. Mosher's president.

Q. Are you acquainted with the handwriting of Mr. Mosher?

A. Yes sir.

Q. Did the original certificate of deposit bear an endorsement on the back of it?

A. None whatever.

Mr. THOMAS: Now we offer in evidence Exhibit No. 1056.

989 Exhibit No. 1056 is received and exhibited in evidence, being to this page attached.

$40,000.00.

Capital National Bank.

LINCOLN, NEBR., *April* 28, 1888.

Paid Jan. 1, 1889, Capital National Bank, Lincoln, Neb.

C. H. Willard Treas. has deposited in this bank Forty Thousand Dollars payable to the order of self on return of this certificate properly endorsed.

Paid Dec. 31, 1888, Capital National Bank Lincoln Neb.

C. W. MOSHER, *Pt.*

No. 17969—Not subject to check.
Interest at —— if left — months.

990 Q. Now I will ask you if you have examined the books of the Capital National Bank with reference to this certificate,

to ascertain what entries were made on the books of the bank with reference to this certificate at the time of its issuance or payment?

A. Yes sir.

Q. Are you able to state what entry if any was made on the books of the bank at the date of the issuance of this certificate?

991 A. Yes sir.

Q. Are the books of the bank with reference to the transaction just referred to now in court?

A. Yes sir.

Q. And open to inspection of anyone desiring to see them?

A. Yes sir, for anything I know.

Q. They are in the possession of Mr. Whitmore on behalf of the Receiver?

A. Yes sir.

Q. To be used in these cases.

A. That is my understanding.

Q. Now you may state what the books of the Capital National Bank show with reference to the issuance of this certificate of deposit Exhibit No. 1056.

992 A. The name and amount on the stub is blank or in other words $40,000 is written down and then crossed out with a pen. The certificate is issued for $40,000. No amount whatever was paid or entered as received on the books of the bank on this certificate. And this certificate was paid as $40,000 on January 7th, 1889 and the amount thereof credited to Outcalt and Mosher.

Q. Now I will ask you to state if you examined any other certificates of deposit issued by the bank, and compared them with the corresponding stub from which they were taken, also with the certificate register, and the general books of the bank, so that you are able to testify the amount for which it was issued as shown by the stub, and certificate register, and other books of the bank, and also the amounts for which it was paid as shown by the books?

A. Yes sir.

Q. Now you may state what you found with reference to such certificates giving the numbers of the certificates, the amounts, etc.

993 A. Certificate No. 19272 was issued on the stub book to G. M. Bartlett for $5.00. The certificate was issued in the same name for $100,000.00 and it was carried to the books of the bank, that is to the certificate of deposit account as $5.00. The certificate was paid as $100,000.

Certificate of deposit No. 21386 was issued to J. E. Hill, $5.00 that is the amount on the stub on December 24th, 1889. The certificate itself is in the name of G. M. Bartlett Treasurer, $50,000 and carried onto the certificate register as G. M. Bartlett, Jr. as $5.00. It is paid as $50,000.

Certificate of Deposit No. 24572 was issued to Mrs. J. M. Merril according to the stub on May 15th 1891 for $641.60. The certificate was issued in the same name but is $1641.60. And it was carried onto the books as $641.60, it was paid as $1641.60.

Certificate No. 24574 the stub shows issued to P. F. L. Ashton May

15th 1891. $1500. The amount on the register $500 and it was paid as $1500.00.

Q. Have you examined the books of the bank with reference particularly to the Certificate of Deposit account, in the individual deposit ledger, under date of April 25th, 1891?

A. Yes sir.

Q. Referring now to a debit charge of $100,000 under that date indicating a payment of a certificate of $100,000 I will ask you if you examined that item of charge and also the certificate of deposit register, certificates of deposit and the books of the bank with reference to that entry?

A. Yes sir, I have.

994 Q. What have you to say with reference to that entry?

A. That was simply a charge of One Hundred Thousand dollars on April 25th, 1891 to Certificate of Deposit account, because there was no such certificate outstanding at that date.

Q. Have you examined the books and documents of the bank, to ascertain whether such a certificate of deposit was outstanding at that date?

995 A. I have.

Q. You may state what investigation you have made, and if you know whether or not such a certificate of deposit was outstanding and unpaid at that date.

A. I examined all the books regarding this certificate kept by the bank and they show no such certificate of deposit outstanding at that date.

Q. On that day you may state if the books indicate the issuance of a certificate of deposit?

996 Q. What did they show?

A. They showed the issuance of a certificate of deposit for $100,250.

Q. Now you may state if you can explain, from your examination of the books and your knowledge as an expert what those transactions indicate and what actually transpired.

A. Yes sir.

Q. You may explain fully.

997 A. There was a duplicate of the credit to the amount of $100,250 fraudulently made on that day.

Q. You may explain fully what you mean by that.

998 A. On that day the Chemical National Bank is charged with $101,516.70. The Nebraska Relief fund is credited $100,250. Certificate of Deposit No. 24,454 was issued to Ihmhoff for $1,166.70 and certificate of deposit No. 24453 was issued to C. W. Mosher for $100 thus balancing the charge of $101,516.70 to the Chemical National Bank. Then they issued a certificate of deposit in the name of J. E. Hill for $100,250 and falsely charged up against the certificate account $100,000 to offset this steal.

Q. What was the number of that certificate of deposit of $100,250 to which you refer?

A. 24452.

Q. I will hand you that original certificate, which is exhibit No.

140 and ask you to examine the handwriting or endorsement on the back of it, and also the writing on the face of the certificate including the signature, and ask you if you are acquainted with that handwriting on that certificate.

A. Yes sir I am.

Q. Who wrote the certificate itself, that is the body of it, and signed it?

A. C. W. Mosher wrote it all.

Q. And now examine the back of it, and state if you know the handwriting of the endorsement on the back.

A. I do.

Q. Whose handwriting is that?

A. C. W. Mosher's.

999 Q. Do you know the handwriting of J. E. Hill, formerly state treasurer?

A. Yes sir, J. E. Hill, never signed that.

Q. Is that J. E. Hill's handwriting on the back of it?

A. No sir, it is Mosher's hand writing.

Q. I will ask you to state Mr. Jones, if during the various and numerous times you have examined the books of the Capital National Bank you made any special inquiry to ascertain its financial condition as to its solvency.

A. I have.

Q. Did you examine the books of the Marsh National Bank with the same purpose in view?

A. Yes sir.

Q. From your examination of these books, and your knowledge as an expert accountant, are you able to state what the condition of the bank was at the various times as to its solvency or otherwise and to the general condition of its assets?

1000 A. I think I am.

Q. Are you acquainted with the various makers of the notes which the bank held as shown by the banks own books, and some of the original paper, if you have seen any?

A. Yes sir.

Q. Are you acquainted with the financial responsibility of Charles W. Mosher?

A. I am.

Q. And of Edwin W. Mosher?

A. I am.

Q. Stark and Mosher?

A. I am.

Q. And W. A. Sharrer?

A. Yes sir.

Q. The Western Manufacturing Company of which E. Hurlbert Jr. was manager?

A. Yes sir.

Q. The Southern Stave & Lumber Company, R. C. Outcalt, W. T. Scott, C. W. & W. W. Marsh, Sycamore Marsh Harvester Manufacturing Company The Marsh Binder Company?

A. Yes sir.

Q. I will ask you if you have made an examination of the books of the Capital National Bank, to ascertain what losses had been sustained by it, and the books of the Marsh National Bank for the same purpose, on or prior to April and July 1st 1890?

A. Yes sir.

1001 Q. You may state what losses, if any the bank had sustained up to that time.

Q. Before answering that question, I will ask you to state if the books from which you obtained that information and knowledge are in court and open to the inspection of counsel for defendants?

A. They are here in court.

Q. Now you may answer the above question.

A. A total loss of $877,000 up to July 1st, 1890.

1002 Q. Now you may state what items comprise the total to which you have just testified.

A. They had a loss of $28,174.70 Donnel-, Lawson & Simpson, a failed bank in New York city. Then afterwards the books show that they took notes of these parties amounting to $58,863.00. Collection account, Marsh Bros., Mosher & Co., was a loss of $100,000.00. Stock & Bond account was a loss of $30,000.00. False credits to Interest paid account $46,813.00. Manipulated Certificates of Deposit $139,995.00. Paid out in dividends and credited to Surplus Account, when there were none $186,000.00. Falso Certificates of Deposit No. 24452, $100,250.00. Bills of Exchange $29,968.00. Worthless Bills Receivable on hand $146,679.70. Falso credits to State Treasurer Hill's open account of $100,000 is what I consider losses that the bank had sustained up to July 1st, 1890.

1003 Q. What paper or notes were included in what you have called worthless Bills Receivable, give it in a general way.

A. Notes given by R. C. Outcalt, C. W. Mosher Mosher & Outcalt, Scott, Tuerk, Sycamore Marsh Harvester Company, Western Manufacturing Company, Stark & Mosher. I have got the number of every note if you want it.

Q. Have you prepared a schedule showing the notes to which you have just referred, which were in the bank and a part of its Bills Receivable on July 1st, 1890?

A. Yes sir.

Q. Is Exhibit No. 1057 the stat-ment to which you refer?

A. Yes sir.

Q. Does that schedule contain the total amount of notes to which you have testified as being in the bank on that day, which

1004 you consider worthless?

A. Yes sir.

Q. Did you compile that from the books of the bank themselves, yourself?

A. Yes sir.

Q. Do you know whether or not that is correct?

A. In my opinion they were perfectly worthless.

Q. I mean is that stat-ment correctly taken from the books.

A. Yes sir.

Mr. THOMAS: We offer in evidence Exhibit No. 1057.

Exhibit No. 1057 received and exhibited in evidence as follows:

1005 *Worthless Paper Held by the Capital National Bank, July 1, 1890.*

49499	Stark & Mosher	$5000	
50003	Stark & Mosher	7242.94	
50004	" "	5926.02	
50006	" "	5505.68	
50007	" "	5623.70	
50008	" "	4307.28	
50009	" "	3968.25	
50022	" "	6000.00	
50048	" "	1438.82	
75021	" "	8631.20	
79082	" "	5000.00	
			$58643.89
80065	Western Manufacturing Co.		5000.00
49342	W. A. Sharrar		4810.30
76015	Marsh Binder Co.		9000.00
80069	C. W. & W. W. Marsh		3600
80070	Sycamore Marsh H. Co		4500.00
49174	Marsh & Hinds		1000
76017	C. E. Tuerk		5693.39
77016	W. T. Scott.	2409.11	
79039	W. T. Scott	4798.85	
50000	W. T. Scott	7644.16	
			14852.12
76030	Mosher & Outcalt.		1250
50526	C. W. Mosher	10000.00	
50527	C. W. Mosher	5200.00	
50531	C. W. Mosher	10500.00	
50536	C. W. Mosher	5000.00	
			30700
50530	R. C. Outcalt.	5200	
50537	R. C. Outcalt.	3430	
			8630

1006 Q. And have you made a similar examination of the books with reference to its condition on July 1st, 1891?

A. I have.

Q. You may state as you have in your previous examination the result of that investigation, as shown by the books of the bank.

Q. Before answering that question, I will ask you to state Mr. Jones if the books, which you examined and from which you are testifying and made the stat-ments or compilation of stat-ments which you refer to in your previous answer, and which you may hereafter refer to are in court now and subject to an examination by the defendants?

A. Yes sir.

Q. Now you may answer the question. You may state as you have in your previous examination the result of that investigation as shown by the books of the bank.

1007 A. Up to and prior to July 1st, 1891 the bank had sustained the following losses,—Donnell, Lawson & Simpson bank account $28,174.70. Notes of Donnel, Lawson & Simpson $58,863.68.

Collection account Marsh Bros. Mosher & Co. $10,000.00. Stock & Bond account $30,000.00.

Also credits to Interest Paid account $70,813.00.

Manipulated Certificates of Deposit, $190,990.00.

Paid in dividends and credited to surplus account, when there was none $220,000.00. Fraudulent certificates of Deposit No. 24452, $100,250.00. Bills of Exchange account $29,968.00.

Steal in State Treasurer Hill's open account $100,000.00.

Worthless Bills Receivable in the bank, $186,137.56.

Making a total of $1,025,196.94.

Q. I will ask you to state what notes are included in the item of $186,137.56 which you have classed as worthless and before you answer I will ask you if you have prepared a stat-ment or schedule in which you have listed the notes which were included in that sum concerning which you have just been asked.

1008 A. I have.

Q. Is Exhibit No. 1058 which I hand you such a statement?

A. Yes sir.

Q. Who compiled that stat-ment, and from where was it taken?

A. I took that from the books of the Capital National bank.

Q. Do the books of the Capital National Bank show that the notes listed there were in the bank at that time?

A. Yes sir.

Q. Did you compile that list yourself?

A. I compiled that list, of course it is a typewritten list supposed to be a copy of what I took from the records?

Q. Well is it a copy of what you took from the records?

A. I think it is.

Q. And are the books from which you compiled that in court?

A. Yes sir.

1009 *Worthless Paper Held by the Capital National Bank, July* 1, 1891.

Taken by bank.	No.	Maker.	Date.	Due.	
8/20-90	49358	Stark & Mosher.....	9/28-89	12/30-89	$12472.25
3/10-91	49499	" "	9/ 3-90	12/ 5-90	5000.00
8/31-89	50003	" "	10/ 1-88	Demand.	7242.94
8/31-89	50004	" "	10/ 1-88	"	5926.02
8/31-89	50006	" "	10/ 1-88	"	5505.68
8/31-89	50007	" "	10/ 1-88	"	5623.70
8/31-89	50008	" "	10/ 1-88	"	4307.38
8/31-89	50009	" "	10/ 1-86	"	3968.25
2/ 1-90	50048	" "	-89	"	1438.82
2/31-89	50022	" "	2/19-89	"	6000.00
8/28-89	50056	" "	12/ 2-89	"	6881.18
8/28-89	50057	" "	12/ 2-89	"	5963.86
11/25-89	75021	" "	11/25-89	5/21-90	8631.20
10/24-90	94019	" "	10/17	11/20-91	10600.00
4/13-91	98030	Western Mfg. Co	4/11-91	8/14-91	5000.00
6/ 2-91	98161	" " "	5/15-91	5/15-91	5000.00
6/ 3-91	99022	" " "	6/ 2-91	9/ 3-91	5000.00
6/ 5-91	99068	" " "	6/ 5-91	9/ 6-91	5000.00
1/13-90	49174	Marsh & Hinds	11/12-88	5/15-89	1000.00
1/ 7-91	96020	" Binder Co	12/12-90	6/16-91	9000.00
6/25-91	102040	C. W. & W. W. Marsh.....	6/23-91	12/26-91	3600.00
6/25-91	102041	Sycamore Marsh H. Co.....	6/20-90	12/23-91	4500.00

Taken by bank.	No.	Maker.	Date.	Due.	
1/ 7-91	96030	C. T. Tuerk	12/17-90	6/20-91	6286.92
			C. W. & W. W. Marsh.		
1/27-91	96039	W. A. Sharrar	12/12-90	6/20-91	1166.62
1/28-91	96040	W. A. Sharrar	6/20-90	6/20-91	5291.30
12/ 1-90	96016	Mosher & Outcalt	12/ 1-90	6/ 4-91	3138.72
12/31-90	97000	" "	12/31-90	1/ 3-91	1040.00
1/15-91	97010	W. T. Scott	1/12-91	7/15-91	2656.00
3/30-91	99027	W. T. Scott	3/23-91	9/26-91	5294.90
8/31-89	50000	W. T. Scott	5/23-87	Demand.	7644.16
10/22-90	50544	C. W. Mosher	10/29-90	5/ 2-91	5000
12/23-90	96025	R. C. Outcalt	12/22-90	6/25-91	4160
5/ 7-91	98065	R. C. Outcalt	5/ 7-91	8/ 8-91	5100.00
5/ 7-91	101011	R. C. Outcalt	5/ 7-91	11/10-91	6240.00
1/ 5-90	95025	R. C. Outcalt	11/ 5-90	5/ 8-91	5200.00
Total					

Ex. 1058.

1010 Q. I will ask you to state if you haxe examined the books of the Marsh National Bank to ascertain if any losses had been sustained at the time it was organized or at the time it became the Capital National Bank?

A. Yes sir, I examined the books.

Q. With reference to what date?

A. I examined the books at the time the transfer was made from the Marsh Bros. Mosher & Co., to the Marsh National Bank, and I examined the books at the time the shift was made from the Marsh National Bank to the Capital National Bank.

Q. You may state if the bank had sustained any losses at the time is was incorporated as the Marsh National Bank?

A. Yes sir.

1011 Q. You may state if you can what losses, if any it had sustained at the time it was incorporated, and became known as the Marsh National Bank?

A. There was a $10,000.00 loss of Marsh Bros, Mosher & Co. collection account. $30,000 loss in Stock & Bond account, those were the principal losses I remember now.

Q. Now I will ask you to state from your examination of the books if you can, what losses if any, it had sustained up to the time the name of the bank was changed to the Capital National Bank.

1012 A. $10,000 loss in Marsh Bros. Mosher & Co., collection account. $30,000 Stock & Bond account, and $28,174.70 of Donnell, Lawson & Simpson, a failed New York bank. Those were the principal losses.

Q. In your examination of the books which are in the hands of the Receiver, did you find any books in which were contained a list of any of the Bills Receivable which was carried on the books of Marsh Bros. Mosher & Co., or the Marsh National Bank?

A. No sir, the book was swiped.

Q. In testifying to losses which had occurred at the time it became the Marsh National Bank, and when the name was changed to the

Capital National Bank, you have included nothing with reference to Bills Receivable that may have been bad?

A. No, I named what the losses were. No Bills Receivable in them.

1013 Q. Do you know anything about the value of the Bills Receivable which was on hand when the Marsh Bros. Mosher & Co., account was transferred to the ledger of the Marsh National Bank?

A. No in fact, No.

Q. I will ask you this question, from your knowledge as an expert and an accountant, and your acquaintance with the books of the National Banks generally, and from your knowledge of the makers of some of the paper, which the Capital National Bank held at various times, during its existence, are you able to state whether or not that bank was solvent or insolvent at various times when these reports which have been introduced in evidence were published?

A. Yes sir.

Q. First I will ask you when these notices that have been introduced in evidence, came to your notice or knowledge, with reference to the date of their publication.

1014 A. As soon as the mail from Lincoln could bring them to Seward in other words the following mail after publication.

Q. Now you may answer the former question. Now I will ask you to state if you can, whether or not the Capital National Bank at the time it published these reports, which were introduced in evidence, was solvent or insolvent.

1015 A. It is my opinion that they were insolvent.

Q. At what time?

A. I put it, at all times. They were insolvent the day they assumed to do business under the name of the Capital National Bank. They had sustained lossed and had bad paper at that time which would more than wipe out their capital stock.

Q. You were speaking yesterday something about cards stating the condition of the Capital National Bank, which were issued in addition to these published notices, you may state what are the facts in reference to that.

1016 A. It was a custom of the Capital National Bank to send out what we term a condensed statement, it was generally in card form and when it wasn't it was on a small slip of paper. And they always mailed us one of these statements.

Q. Did those cards contain anything else besides the statement of the condition of the bank?

A. The names of all officers and directors.

Q. Were the names of the directors on those cards signed by the directors or printed?

A. Printed.

1017 Q. Were the names of all the officers and directors of the bank on those cards?

A. That is my recollection, the officers and directors.

The COURT: The names of the directors and officers were at the top as a sort of heading?

A. As a rule, and sometimes there would be just the heading of the bank at the top, and then would follow the stat-ment, and then the officers and directors below. They would change the form a little.

1018 Q. I will ask you to state whether or not an inspection of the books of the Capital National Bank would have disclosed any of the irregularities to which you have testified, as to the variations between the books and its actual condition?

A. Yes sir.

Q. I will ask you first what has been your experience in the keeping of books of a bank, and your knowledge concerning that?

A. I have had about eighteen or nineteen years experience in the banking business and I believe I am competent to judge of any set of books, bank books.

Q. What experience have you had in examining bank books and comparing stat-ments with the actual condition, and inquiring generally into the condition of banks as shown by the books themselves, and as compared with the actual condition as it existed?

A. You are speaking of the Capital National Bank?

1019 Q. No banks generally.

A. Oh, I never had a great deal to do with many banks over the country.

Q. Well with your own.

A. I know all about my own. And I think I know all about the books of the Capital National Bank, I have gone all over them.

Q. Have you found any irregularities other than those you had testified to during your personal examination?

A. Yes sir, I have testified to only a small per cent. of the irregularities.

Q. You may name in a general way some of the other things you found in your examination of the books of the bank, the Capital National Bank and the Marsh National.

A. They are almost too numerous to mention, in that way.

Q. Well just in brief form, state some of the matter you have found.

1020 A. I believe I testified to the erasures in the Stock & Bond account. And they had a Bills of Exchange account, which was created by fictitious entries, and it run a little while and it was wiped out with some fraudulent notes, which were put in the bank and carried for a short time.

And in regard to their bank accounts, I am satisfied that there wasn't a month that that bank ran an account with any bank where it was run correctly. They were all the time making fraudulent charges to cover up fraudulent deals, and then it would remain there a short time and then they would have to shift them to some other form. They had an account there by the name of Bills of Exchange, which I consider was principally a dumping ground to cover up their rascality,—there were a certain amount of legitimate transactions that were carried through that account, but the bulk of

that account from an examination of the books, I would term it a dumping ground. It was a fraudulent account in all ways.

Then the credit of One hundred thousand dollars in the State Treasurer's account in December 1889 was a steal of one hundred thousand dollars, which threw the books out of balance for a little over three years. I mean by that was out of balance every day for over three years to the extent in round numbers of $100,000.

1021 Q. Was it hard to detect that difference?

A. No sir any man of good sense, would not have to be a bookkeeper to know that the books were out of balance one hundred thousand dollars. You may take the certificate of Deposit account, there was a thing that a blind man could almost see. They would issue a certificate of deposit, we will say for one hundred thousand dollars, and put $5.00 in the bank and enter it up on one book as One hundred thousand dollars and on another book as five dollars.

Q. Do you mean to say they did that?

A. Yes sir, the books will show that. And the books will show,—I think I testified yesterday in regard to the forty thousand dollar certificate, where they had filled out the stub and then just drawn a line through it. Nothing in the certificate of deposit book, that line is left blank. They would pay it and charge it at forty thousand dollars.

1022 A. It was divided between Mosher and Outcalt. Mosher takes $25,000 and Outcalt takes $15,000 of it, credited to their personal accounts.

Mr. BURR: On the books of the bank?

A. Yes sir. And also in the certificate of deposit account there are a great many certificates issued where the stub book in both name and amount does not agree with the name, or the amount carried onto the other books of the bank, neither do they agree with the amount for which the certificate itself was issued, or with what the certificate itself was paid out at. In this account alone that bank was defrauded out of in round numbers three hundred thousand dollars, in other words that amount of money was just stolen, taken right out of the bank.

Q. What examination of the books and papers of the bank would be necessary to obtain those irregularities?

1023 A. Simply a comparison of the stub books, with the books of the bank. The certificates themselves, after they had been paid, with the books of the bank. The certificates will show in many cases thousands of dollars where it is issued and paid, when the books of the bank show it is only issued for a trivial sum, say five ten or fifty dollars, and carried onto the books at that amount. It is the easiest thing in the world to be detected by anybody of half brains.

Cross-examination.

By Mr. DEWEESE:

Q. How old were you when you commenced banking?

A. Oh past 21.

Q. Had you ever clerked for anybody previous to that?
A. Been in a bank some.
1024 Q. What bank?
A. State Bank of Nebraska.
Q. Was that finally merged or changed into the Jones National Bank?
A. No sir it was the present State Bank.
Q. Here in Seward?
A. Yes sir.
Q. Your bookkeeping has been of your own books I suppose in the bank?
A. Yes sir.
Q. You have never been engaged in the profession of accounting or making a public auditor or accountant in any way?
A. Only in a friendly way, I have looked over books at the request of my friends.
Q. When did the Jones National Bank start in business?
A. 1883.
Q. Here in Seward?
A. Yes sir.
Q. Was the Marsh National Bank doing business then in Lincoln?
A. I presume it was, we never done any business with the Marsh National.
Q. Didn't have any deposits there?
A. No.
Q. Did you have any on deposit with the First National of Lincoln?
A. No sir.
Q. Nor any other bank in Lincoln.
A. No sir, the Capital National Bank was the first account the Jones National Bank ever had in Lincoln.
Q. When did you first start that account with the Capital National Bank?
A. My memory is somewhere in 1885.
1025 Q. After you opened up the Jones National?
A. Yes sir.
Q. And you continued to keep your account there, ever since, up to the time of the failure?
A. Yes sir.
Q. What rate of interest did you get on your deposits there?
A. Two and three per cent.
Q. Two per cent.—what made the difference between two and three per cent.?
A. I spoke that way. I think the early part of it was three per cent. and the latter part two.
BURR: Two per cent. per month or per annum?
A. No, on the bank balance.
BURR: Daily balance?
A. No monthly balance.
Q. What rate were you getting at the time the bank failed?
A. I think two per cent.

Q. Did you hold any of your deposits by virtue of certificates of deposit?

A. No sir.

Q. Your account was subject to check any day I suppose.

A. Yes sir.

Q. I understood you to say that the Marsh National bank lost ten thousand dollars on the Marsh Collection account, is that correct?

A. Marsh Bros. & Mosher collection account.

Q. And how was that lost do you know?

A. Yes sir, it was on a transfer. The Marsh National Bank was a continuation you might say, or assumed the business of Marsh Bros. Mosher & Co. and when Marsh Bros. Mosher & Co., closed their business that day, they balanced their book and the balance
1026 was all transferred into a new set of books.

Q. Do you mean to state that as a fact?

A. Yes sir.

Q. Marsh Bros., Mosher & Co. did not run a banking business did they?

A. That is what the books show they did.

Q. Weren't they mere brokers in collecting for the Marsh Manufacturing Company?

A. They did that, and the books show they received deposits and issued drafts, and done a general banking business.

Q. Well you say this ten thousand dollars was lost in the account because it was transfered to the Marsh National Bank?

A. Yes sir, it was transferred ten thousand dollars short.

Q. So that the Marsh National didn't get anything.

A. No sir, not for the ten thousand dollars.

Q. What did the Marsh National have to show in place of that, if anything, on its books?

A. It was manipulated, covered up somewhere.

Q. You don't know how?

A. No sir. (Let me have my minutes.) I believe I do. (Witness examines minutes.) There was ten thousand dollars erased from Marsh Bros. & Mosher collection account and this ten thousand dollars was added to the Omaha National Bank by simply prefixing the figure "1" to the account of the Omaha National Bank.

Mr. BURR: Figure "1" in what column?

A. It would be the ten thousands column.

Q. Why did you charge this to the Capital National Bank?

A. It is a fraudulent charge.

1027 Q. The Capital National Bank never got it.

A. You misspeak, you mean the Omaha National Bank, don't you?

Q. No, the Capital National; how is it that you figure that the Capital National Bank lost this ten thousand dollars?

A. I haven't so stated.

Q. Have you included it in this schedule of losses, you gave a list of losses, in your first item was this ten thousand dollars that the Capital National Bank had sustained?

A. Yes sir, that is correct.

Q. How do you get that into the Capital National Bank?

A. The Capital National and the Marsh National were one and the same thing, only they changed the name from Marsh National to the Capital National Bank.

Q. This loss was sustained prior to the organization of the Capital National bank.

A. The Capital National was never organized, it was the Marsh National Bank, simply a change in the name only.

Q. That is your opinion. Have you examined the minutes or records?

A. Yes sir, that is what the books show.

Q. Do you mean to say that these defendants that are sued here were connected in any way with that Marsh National Bank, except Mosher and Outcalt?

A. I don't believe they were, no sir, but that wouldn't make any difference.

Q. Then why do you count this ten thousand dollars as a loss to the Capital National Bank?

A. Because it was a loss to the Marsh National Bank, and the Marsh National,——

Q. Whatever the Marsh National had sustained, why you think the Capital National Bank had sustained?

1028 A. Yes sir, because it is the same institution.

Q. Then if you say there is a false charge to the Omaha National Bank, how was that disposed of?

A. I never followed it up.

Q. If nothing went to the Omaha National, and nothing went out of the Marsh National, it is simply a matter of marks and figures isn't it?

A. In part, that is in getting away with it.

Q. Well did that same difference exist between the Omaha bank's and the Capital National bank's account at the time of the bank failure?

A. Oh no.

Q. What became of it then, you don't know what became of it?

A. No sir, it would take quite a while to follow down all their crooked trails.

Q. You say there was a loss of thirty thousand dollars on account of the Stock & Bond account?

A. Yes sir.

Q. And you figured that loss was sustained because the thirty thousand dollars in the Stock & Bond account on the Marsh Books was erased and added to the Bills Receivable account on the same books, the same bank's books, do you?

A. In part, yes sir.

Q. Is that the only foundation you have got to say there was any loss in that account?

A. No sir.

Q. What have you got?

A. If that was a legitimate transaction, the books of the bank

would show it. What I mean by that, if they had any Bills
1029 Receivable there that they were carrying in the bonds account, or bonds that they were carrying in bond account there would have been an entry through the journal which would have showed that, and the Bills Receivable would show it but as this account is kept it is simply the use of a jack-knife and a pen.

Q. The jack-knife erased from the Stock & Bond account and the pen added to the Bills Receivable account?

A. Yes sir.

Q. Now was there anything lost by that?

A. Yes sir, because when that stock and bond account of $30,540.00 was created there was $30,540 taken out of the bank.

Q. How do you know there was?

A. The books of the bank so show it, on January 6th, 1882 April 21st 1882, July 24th 1882 December 29th, 1882.—there is four charges of $7,500 each that make up $30,000 of this stock and bond account.

Q. And because it was transferred by the use of a jack-knife and pen from the stock and bond account to the Bills Receivable account you think the bank lost it?

A. To be honest with you, they didn't have anything to transfer.

Q. Then the four items you speak of never went in?

A. The money went out to create this account.

Q. And the reasoning you give on that, applies to all your statments here, about these different accounts, is that the kind of reasoning you base your stat-ments on?

A. No sir.

Q. What other kind have you that will apply to this thirty thousand dollar erasure and addition, erasure from one account and addition to the other?

1030 A. As I stated the books show that there was thirty thousand dollars used of the bank's money when this account was created, and when it was wiped out it was done with the use of a jack-knife.

Q. This Capital National Bank wasn't in existence at that time, nor the Marsh National either.

A. No, these three banks were continuations of one another, you can follow this account from the time it is created until it is wiped out and it will carry you along until you get into this bank.

Q. Did you examine the Bills Receivable books to see if thirty thousand dollars of Bills Receivable went into the bank at that time, at the time this erasure of bonds, and addition to Bills Receivable was made?

A. The books show nothing, it is simply blank.

Q. Have you seen that book?

A. Yes sir.

Q. Have you seen that Bills Receivable book?

A. It couldn't be on the Bills Receivable book unless it passed through the journal.

Q. Did you ever see the Bills Receivable book?

A. No, that is one of the books that they stole.

Q. Who stole it?

A. I couldn't say who, I didn't see them. I mean the officers of this institution, that had charge of it, when it went into the hands of the government, there was a lot of these things gone.

Q. So you have never seen the book to say whether there was any entries made or not, the one that was stolen?

1031 A. No I never saw that Bills Receivable book. I have seen all the other books, the regular books of the bank that should show this transaction.

Q. You don't know what Bills Receivable it was that went in at the time this charge was made?

A. The thirty thousand dollars?

Q. Yes sir.

A. The books show none.

Q. How did they balance if they showed none, were the books out of balance at that time, the Bills Receivable book?

A. That is the book, that is the Individual Balances, it is a memorandum book.

Q. Well if there was none went in, did that throw the books out of balance then?

A. You are speaking of the general books of the bank now are you?

Q. I suppose so, yes.

A. No sir, the general books of the bank were balanced. You take thirty thousand dollars off of one place, and put thirty thousand dollars in in another place and your books will balance just the same.

Q. And all the foundation you have got for that loss is that there was an erasure in the Stock & Bond account, and an addition of the same amount that was erased added to the Bills Receivable account.

A. That together with the nature of the transaction. It is not done in a business way, the way that a genuine transaction would be done.

1032 Q. That is it is not done in the way that you would have done it.

A. It is not done in the way that any bookkeeper, any banker would have done it, and done it honestly.

Q. Do you know who did it?

A. No sir.

Q. You spoke of the Bills of Exchange account amounting to $29,968.00 being a loss to the bank.

A. Yes sir.

Q. When it was lost what took its place?

A. Three forged notes.

Q. Amounting to how much?

A. Amounting to $29,968.00.

Q. What date?

A. July 29th, 1886.

Q. What I want is the date when the Bills of Exchange was credited with these notes of $29,968.00.

A. That is the date I just gave you.

Q. Whose notes were they?

A. The First National Bank of Kearney, $10,000.00. The First National of Hastings, $10,000.00 and F. S. Johnson & Co. of Milford $9,968.00.

Q. When were they taken off of the books?

A. I couldn't tell you without looking at the books.

Q. Are these notes or the renewals therefor included in your schedule of worthless paper?

A. No sir.

Q. How do you know?

A. Why they wasn't on hand at that date.

Q. You didn't trace them out in any way?

A. Yes sir.

1033 Q. What squared this account then?

A. What account.

Q. For these notes.

A. I couldn't tell you now sir.

Q. You don't know?

A. I didn't make any memorandum of it. I followed it until I found they were forged notes, and I stopped there and let the other fellows show the rest.

Q. How do you know they were forged?

A. Two of the parties teld me so. I think two or them have testified they never gave them.

Q. You spoke of certificate of deposit No. 17969 for forty thousand dollars, what was the date of that issue and payment?

A. There are two paid dates of this certificate. The first one is December 31st, 1888. The other one is January 7th, 1889.

Q. Have you examined the book that shows that, any book of the bank that shows such a payment?

A. Yes sir.

Q. I call your attention to certificate of deposit No. 19272 when was that certificate paid?

A. I couldn't give you the exact date of the payment.

Q. Do you know whether the books show or not?

A. No I couldn't say. I know the certificate was deposited, I saw the original entry and the amount and the man's pass book for that certificate.

Q. It wasn't a book kept in the bank, it was some man's pass book. The state Treasurer's pass book.

Mr. BURR: It was a book kept by the bank then.

A. Certainly.

Q. I call your attention to certificate No. 21386, about

1034 which you testified yesterday, can you give the date when that was paid?

A. The register shows December 24th, 1889, the certificate of deposit register.

Q. That certificate was for how much?

A. That certificate was for fifty thousand dollars.

Q. And the individual balance book of this account, does the individual balance book show when this certificate was paid?

A. Yes sir.

Q. Do you know the date?
A. December 24th, 1889.
Q. And that is the date of the issuance of it, isn't it?
A. Yes sir.
Q. And the individual balance book shows the correct amount of fifty thousand dollars?
A. Yes sir, the stub shows five dollars.
Q. What is there wrong about the entry of fifty thousand dollars on the general books of the bank?
A. Beacuse one book shows it at five dollars. Another book shows it at five dollars, and another book shows it at fifty thousand dollars.
Q. All books of the bank show it at the correct amount. The stub of this certificate is not a book of the bank, it is merely a stub of that certificate.
A. It is one of the books of the bank.
Q. It is the stub of the certificate.
A. Yes sir. The register of the certificate is one of the books of the bank, and that shows it at five dollars.
Q. The balance book shows it at the correct amount?
A. Yes sir.
Q. You testified to certificate No. 24572.
A. Yes sir.
1035 Q. I understood you to say that the stub of that certificate showed the amount to be $641.60.
A. Yes sir.
Q. And the register shows $641.60?
A. No sir.
Q. What did the register show?
A. The register shows $1641.60.
Q. The register does?
A. Yes sir.
Q. Are you sure of that?
A. That is what my memorandum shows, Mr. Deweese.
Q. The balance book shows what amount?
A. $641.60, a difference of $1000.00.
Q. And the amount paid was what?
A. $1641.00.
Q. How do you know?
A. The books of the bank show it.
Q. The balance book of the bank shows it?
A. Yes sir, they are all itemized.
Q. But are you not examining the book in making that statement.
A. No, but I will if you want me to.
Q. I call your attention to certificate No. 24574, that was given to somebody by the name of Ashton, for $1500.00.
A. Yes sir.
Q. Do you know what the daily balance book shows that certificate to be, and the amount that was paid?
A. $1500.00.
Q. And that was the real amount of the certificate wasn't it?

A. Yes sir.

Q. So there was nothing wrong in the payment of that?

A. Only that the certificate register showed——

1036 Q. There was nothing wrong with the certificate, or the payment of the certificate?

A. No sir.

Mr. DEWEESE: That is all.

Redirect examination.

By Mr. THOMAS:

Q. Why do you say there was a loss of ten thousand dollars in the Collection account, what is your reason for thinking there was such a loss?

A. Because a collection account properly kept is always what we would term a credit account. And a collection account properly and honestly kept can never be overdrawn. This account which I speak of, Marsh Bros. & Mosher was an overdrawn account, to the amount of $14,573.32 and when they take ten thousand dollars away from it, they take ten thousand dollars away from a minus quantity, something that does not exist.

1037–1110 Q. Then in your opinion as an expert and based upon an examination of these books, and the way in which this account was treated was this account a valuable asset?

A. Why no sir. As I said, a collection account cannot be overdrawn if properly and honestly kept.

* * * * * * *

1111 Mr. C. E. YATES, called as a witness on behalf of the defendants and being first duly sworn, testified as follows:

Direct examination.

By Mr. DEWEESE:

Q. Were you a director of the Capital National Bank?

A. Yes sir.

Q. You may state how long you were director?

A. I couldn't say the exact time, but for a long while several years.

Q. What business were you engaged in?

A. Superintendent of Telegraph of the B. & M.

Q. During all of that time?

A. Yes sir, since 1873. That is I have been in Nebraska since 1873.

Q. What portion of your time did your duties as Superintendent of Telegraph take?

A. Why, I was out on the road the most of the time.

1112 Q. Out on the road?

A. Yes sir, building lines.

Q. Did you attend any of the directors' meetings of the Capital National Bank?

A. When I was in town yes sir.

Q. What arrangement was made if any toward looking after the securities, and the investments and the assets of the bank?
A. There were two men appointed.
Q. Who were they?
A. Professor Stuart and Mr. Holmes.
Q. What was their business character and capacity and experience?
A. A No. 1.
Q. What do you mean by that?
A. Why the best men there was in the city.
Q. What had these men, what character of business had these men been engaged in, personally, on their own behalf?
A. Loaning money.
Q. For years?
A. Yes sir.
Q. Wealthy men, were they?
1113 A. Very wealthy.
Q. I will ask you whether this committee made reports to the directors from time to time of their investigations of the bank papers and affairs?
Q. Did they make any report of their investigations of the assets in writing or verbally?
A. Verbally.
Q. At what time would they do this?
A. At a meeting of the board of directors.
Q. What inquiry was made of them, in reference to this matter, by the other directors?
A. Well, I couldn't say about the other directors, but I can say about myself.
Q. You are one of the others?
A. Yes sir.
Q. Anything that you know.
Q. Tell the fact, what inquiry was made by you, or in your presence of this committee in reference to this matter at the meetings.
1114 A. When I was out on the road, when I would come in, I would ask these men—I didn't mean if there was a meeting held when I wasn't there.
Q. I am asking you at the meeting when you were there, whether inquiries were made of this committee, and whether they reported what they had done?
A. Yes sir.
Q. Now I will ask you to state what was the character of such investigation and report with reference to the character of the assets.
A. There was a general discussion at the meetings in regard to the paper, and they would always take up each piece of paper and comment upon it, and claimed it was all right.
Q. That is, this committee would?
1115 A. Professor Stuart and Mr. Holmes at a meeting of the board of directors.

Q. Now you may state whether you knew, or had any intimation in any way of anything being done wrong in the bank.
A. No sir, surely not.
Q. You may state whether R. O. Phillips was one of the directors at the time.
A. He was.
Q. And is he dead?
A. He is dead.
Q. Mr. Hamer is also dead?
A. Mr. Hamer is dead, yes sir.
Q. And Mr. Stuart?
A. Yes sir.
Q. And Mr. Holmes?
A. Yes, all dead.
Q. He died before the others?
A. Yes sir.
Q. Now you may state whether any conduct of Mr. Mosher's or anyone else connected with the bank came to your knowledge, from anything you did or heard or investigated to have any influence upon your judgment concerning his integrity and his honesty or his ability as a financier, or the contrary.
1116 A. No sir, I had the utmost confidence in them. Never heard anything against their integrity.
A. Well I had the utmost confidence in them.
Q. Did you know of any frauds being committed by them in any way?
A. No sir.
Q. In the issuing of paper which was hid upon the books or the entering of any different amount from the real transactions, or anything of that kind, or of anyone connected with the bank in the same way.
A. No sir.
1117 Q. Well you may state whether you ever made any false entries or covered up anything, or hid the real transactions of the bank.
A. No sir.
Q. Did you ever know of any being done?
A. No sir.
Q. Did you ever hear of any being done?
A. No sir.
Q. I will ask you to state how much stock you had in the bank.
A. One hundred thirteen shares.
Q. How much of your private money was in the bank at the time of its failure?
Q. How much money did you deposit the day before the bank failed, in the bank?
1118 Q. What steps did you take to satisfy yourself of the soundness of the bank and of its management as conducted by Mosher and Outcalt, if any?
A. I always saw the bank examiner, made it my business.
Q. Every time he examined the bank?

A. Every time he examined the bank.
Q. What do you mean by saying you saw the bank examiner?
A. I made it my business to see him, I was on the road a good deal and I would meet him, he lived at Wahoo, and I would ask him,——
1119 Q. I will ask you if you are a bookkeeper?
A. No sir, I am not.
Q. Have you ever been a bookkeeper?
A. No sir.
Q. You have always had the one business of being Superintendent of telegraph lines?
A. Yes sir, and that of a dispatcher.
Q. And dispatcher?
A. Telegraph operator and dispatcher, and Superintendent of Telegraph.

Mr. DEWEESE: That is all.

Cross-examination.

By Mr. THOMAS:

Q. You say your have been Superintendent of the B. & M. Telegraph lines since 1883?
A. Yes sir, I have been to work for the company since '73.
Q. And have been continuously up to this time?
A. Yes sir.
Q. And you attended most of the directors' meetings?
A. I did when I was in town.
1120 Q. You attended the most of them in fact?
A. Well no.
Q. Don't the minutes show that you attended the most of them?
A. I always made it a point to attend the directors' meetings if I was in the city.
Q. These meetings were held at the bank?
A. Yes sir.
Q. You attended the meetings when the dividends were declared?
A. Not all of them.
Q. You received your dividends right along?
A. Yes sir.
Q. And you signed a great many of these reports?
A. Yes sir every time they made a report.
Q. And when you signed them you didn't know whether they were true or not?
A. Well I had confidence in the officers.
Q. You didn't know whether they were *ture*?
A. No, of course.
Q. You never made any inquiry, never examined the books?
A. No sir.
Q. Never counted the cash?
A. No sir.
Q. Never looked at the Bills Receivable?
A. No sir we had men to do that.

Q. You never looked over the real estate?
A. No sir.
Q. You signed the reports, that came to you without making any inquiries to know whether it was true or not.
A. Yes sir, I always made inquiry of the gentlemen that brought them down.
1121–1131 Q. Never examined the books?
A. No sir.

Mr. THOMAS: That is all.
Witness excused.

* * * * * * *

1132 Mr. D. E. THOMPSON, called as a witness on behalf of the plaintiffs and being first duly sworn testified as follows:—

Direct examination.

By Mr. ROSE:

Q. Are you the defendant David E. Thompson?
A. Yes sir.
Q. Where do you live?
A. I live in Lincoln.
Q. Were you ever director of the Capital National Bank?
A. Yes sir.
Q. Did you receive any pay or compensation for action as director of that bank?
Q. Did you receive any pay for acting as director in that bank?
A. No sir.
Q. Did you hold any other office, at any other time in that bank?
A. No sir.
Q. When did you become in any way connected with that bank? About what date?
A. I think it was in 1884 when it became the Capital National bank was the time I entered it.
1133 Q. How did you acquire your stock in that bank?
A. Bought it and paid for it.
Q. Paid the money into the bank?
A. Yes sir paid cash for it.
Q. In full?
A. Paid a premium for it.
Q. What rate did you pay?
A. I paid a premium of nine per cent. for it, when I bought it.
Q. Were you ever connected with the Marsh National Bank?
A. No sir, in no way.
Q. In any capacity?
A. No sir.
Q. Were you ever connected with the firm of Marsh Brothers & Mosher in any capacity?
A. No.
Q. Do you remember about the time the Capital National Bank was organized of anything being mentioned of Donnel, Lawson & Simpson?

A. I remember very well the matter was a subject of discussion. I think the first meeting we had after the organization.

1134 Q. How was that disposed of, whether that should be counted as an asset or not?

A. Mosher said——

A. That account came into the Capital National Bank at the time of its organization. At that time at that first meeting Mosher said "that is not an account, that rightfully belongs to the Capital National Bank, it was a loss if there is a loss, of the old institution and Outcalt and I will take care of that."

A. The Capital National Bank never had any loss on account of Donnell, Lawson & Simpson.

Q. What if any knowledge did you have at any time of the Capital National Bank's incurring any loss on account of the ac-

1135 count of Donnel, Lawson & Simpson of New York?

A. My only knowledge of that was the discussion of this account at the time of the organization of the Capital National Bank and Mosher and Outcalt saying at that time that they would see that that account was cared for, and they did do it.

Q. Now Mr. Thompson, at the time you organized, you say the Capital National Bank, were there entire, new directors taken in that had never been connected with the Marsh National Bank?

A. I think the whole directory was new, at the time of the organization of the Capital National Bank.

Q. How would it be with reference to Mosher and Outcalt.

A. Except Mosher and Outcalt.

Q. Do you know who had been the managing officer of the Marsh National Bank?

A. Mosher and Outcalt had been.

Q. The Capital National Bank succeeded to their good will and business?

A. Yes sir.

Q. Now in the organization of the Capital National Bank with a new directory, to what persons was the management of the new bank confided or delegated by the directors?

A. To the President and Cashier, Mosher and Outcalt, and to the executive committee that was elected for the purpose of supervising the management of the bank, and that committee was made up of W. W. Holmes, and Prof. A. P. S. Stuart.

1136 Q. Are you acquainted with what was the standing of C. W. Mosher at that time as a banker and business man in that community?

A. Yes sir, I am.

Q. Now what was it?

A. First class.

Q. Did you personally regard him as a capable banker?

A. I did. Everybody did.

Q. And as a man of integrity?

A. I did and everybody did.

Q. Do you know what at that time was the standing of R. C. Outcalt in that community?

A. He was the same as Mosher, except he wasn't looked upon as being as wealthy as Mosher was.

Q. What was his reputation for probity?

A. It was first class.

Q. Was he regarded by yourself as a competent, trust-worthy banker?

Q. State how you regarded him at that time, as a banker.

A. I regarded him very highly as a banker, and considered him and Mosher a very strong team.

Q. Were you acquainted at that time with W. W. Holmes and A. P. S. Stuart?

A. I had known W. W. Holmes 12 years at that time. I had known professor Stuart a lesser time, I couldn't say for how long, but for several years.

Q. Do you know what W. W. Holmes' business had been prior to that time?

A. Money loaner.

1137 Q. Do you know what Prof. Stuarts business was?

A. He was a property owner and money loaner at that time.

Q. What was the character and reputation of Mr. Holmes as a business man?

A. Both Holmes and Stuart was considered the very best in Lincoln, their judgment was considered always good, they were both wealthy men and had made their money by managing money.

Q. Have you resided continuously in Lincoln since 1884 or 1885?

A. Yes sir, I have.

Q. During any portion of the time from the organization of the Capital National Bank, until January 1893 had you been absent from home?

A. Lincoln has been my only place of residence, but I have been three times in Europe on account of my health. I had been away from home very much on account of my health.

Q. When were you in Europe?

A. I was there a good part of the year 1885 and a good part of the years 1888 and 1890.

Q. During the period of your absence was your absence known to the rest of the directors?

A. Yes sir.

Q. And all consented to your being away?

A. Everybody in Lincoln knew of my business.

Q. Except at the periods of your absence did you as a director of the Capital National Bank take any part in the affairs of the bank in any way?

A. Yes sir.

Q. Now so far as the duties of administration devolved upon you as a director, state how and in what manner you discharged them.

1138 A. Well first I want to state, I want to say that I am not a bookkeeper I never had an education except about five

years as a child, never went to school except about five years as a child. That would make it impossible for me to know anything of the books of the bank. I think I never was in Lincoln at a directors meeting, or on the day of a directors meeting that I did not attend it. There never was a time from the time I went into that bank until it closed that I did not take every opportunity after an examination by the bank examiner to ask him of the condition of the bank. Hayden was the bank examiner soon after the organization of the bank and I knew him well, after Hayden came Griffith, and I knew him well. They were both friends of mine and after each examination, when I saw those men, I always asked how they found things in the bank.

A. Their answers were always to the effect that the bank was al- right, there never was any criticism by either of those men to me of the condition of that bank.

1139 Q. Now Mr. Thompson at the directors meetings, what if any steps were taken by you to inform yourselves by statements of the officers or otherwise as to what was the condition of the bank and what had been its earnings?

A. At every directors meeting that I attended, as I have said before I think I never missed one when I was at home, the executive committee or the committee whose duty it was to look after the affairs of the bank were asked how they found things. They were asked for their stat-ments that they always made on a slip of paper, that was laying there on the Directors table. The officers of the bank prepared their stat-ment of the gross and net earnings of the bank and it was there that I got all my information of the condition of the bank from those two sources.

Q. Up until the suspension of the bank had you still believed in the capability and integrity of the President and Cashier of *of* this bank?

A. I never was more astonished over a business matter, of any kind in all my life, as a man that I was over the failure of that bank. I was in Terra Haute when the bank failed.

1140 Q. Now Mr. Thompson, you may state whether the confidence, that you originally had in Mr. Mosher and Mr. Outcalt, and in their ability to manage the affairs of the bank continued up until the suspension of the bank?

A. I never had occasion to question the integrity of either of those men, the business integrity, up until the failure of the bank. I had had some little trouble, personal trouble with Mosher, but I had never had any business trouble or reason to question him.

Q. What other occupation did you have, if any, from the time of the organization of the bank until the time of its suspension?

A. From 1884 until 1890 I was Superintendant of the Burlington road. In 1890 I left the Burlington road and took charge of the Lincoln Gas Company, and the Lincoln Electric Company and I was immediately after that,—well during all of that time, I will correct myself in this. I said from 1884 until 1890 I was Superintendent of the Burlington road and I was previous to those years the owner of a string of hotels and those things were all that I had

in the way of business until 1890. In 1890 in addition to the hotels which I owned and have ever since I took c-arge of the Lincoln Gas Company and the Lincoln Electric Company and
1141 the Farmers & Merchants Insurance Company as an active officer. It was organized in 1885 and at that time I was elected Vice President, but I had no active charge of it until 1890.

Q. What knowledge did the other directors of the bank have of your outside business?

A. They all knew of it.

Q. How many miles of the Burlington railroad were under your charge as Superintendent?

A. At the time I left the road in 1890 there were eleven hundred miles.

Q. How many hotels did you operate during those years?

A. Nine.

Q. How closely did those enterprises occupy your time and how exacting was the labor thrown upon you?

A. Well I was a very busy man through it all and of necessity away from home a good deal of the time, but at home as much as I could be.

Q. After the year 1890 when your office of Superintendent of the Burlington terminated, how closely did your enterprizes occupy you in the insurance company and gas company and electric light company and your hotels?

A. Well they occupied all of my time, but of course I
1142 wasn't taken away from Lincoln as much as when I was Superintendent of the road. The hotels took me away some, but not as much as the hotels and road together did.

Q. Did you before the suspension of this bank become interested in other banking enterprises in Nebraska or elsewhere?

A. Yes sir, at the time and before I left the Capital National Bank or really ceased to be interested in it more than in a very small way, I became Vice President of the American Exchange Bank in Lincoln.

Q. Connected with a bank at Aurora?

A. Yes I organized the Aurora State Bank, I think that was about 1890 we organized there, but I couldn't just say off hand. I have been President of that bank ever since its organization and am now.

Q. What information did you have if any prior to the suspension of the Capital National Bank, that C. W. Mosher under the name of the Western Manufacturing Company was obtaining funds from the bank, or putting the Western Manufacturing Company paper through the bank for the purpose of re-discounting or otherwise?

A. I had no knowledge of it at all.

Q. Was the matter of making discounts to Mosher under the name of the Western Manufacturing Company a matter which ever came before the Board of Directors or which you were cou-seled about?

A. No sir.

Q. What knowledge prior to the suspension of the bank, did you have that Mosher in his personal name was allowed to put in $85,000.00 paper and Outcalt $75,000.00 of their own notes?

A. I never knew it at all until McFarland the first receiver told me of it.

1143 Q. What knowledge did you have of the overdraft of the firm of Mosher & Outcalt and of the firm the Western Manufacturing Company and of C. W. Mosher personal- prior to the time of the suspension?

A. I had no knowledge at all of it.

Q. Were the overdrafts a matter within your control as a director?

A. Not at all. The officers of the bank and the Executive Committee had absolute control of that bank all of the time. The directors elected the executive committee purposely that they should look after it.

Q. Did you have any knowledge or information or intimination from any source prior to the suspension of the bank, that it was in any financial difficulty or had sustained any losses of any consequence?

A. None at all except the little matter that would always develop at each directors meeting. Of course a bank is always making losses, but there were never any losses made there that came

1144 to our attention that were at all serious.

Q. Did you have any accounts which you absolutely controlled at the time of the suspension of the bank?

A. Yes sir.

Q. Among other accounts mentioned here by Mr. Whitmore, when he was testifying is an account of "C. W. Mosher Treas." do you know whose account that was?

A. I do.

Q. Whose was it?

A. The Farmers & Merchants Insurance Company.

Q. Who control-ed the account?

A. I did.

Q. Did Mr. Mosher have any authority to draw checks against it?

A. None whatever.

Q. Did he in actual practice, ever draw a check against that account?

A. He never did draw a check against it, never had a right to.

Q. Did you ever receive or accept a credit to that account, or have a charge, except for funds that were absolutely bonafide, in connection with the insurance company's business?

A. No I never did.

Q. What were the balances in that account at the suspension of the bank?

1145 Q. There is a purported letter of date February 19th, 1892, alleged to have been signed by yourself, and addressed to the Comptroller of the Currency, in which, mention among other things is made of the paper of E. W. Mosher, and among other things the letter contains these words, "we would say in regard to the item 50950.28 E. W. Mosher that this amount appears on the books to be a loan to him endorsed by C. W. Mosher, and secured collaterally by notes of many individuals in smaller amounts aggregating the

same amount made to E. W. Mosher. The facts are that this account is made up with small notes taken in a territory from which comes the best products of the state, and considered a good field for a line of loans and E. W. Mosher was authorized to get good paper of this character for the bank, and such notes being made in the name of E. W. Mosher" etc. What do you know about that transaction, and what did you know about that transaction?

1146 A. May I be permitted to simply say what I know about it?

Q. Yes sir.

A. These Mosher notes came about in this way. Mosher and a man by the name of Stark had been doing business for themselves in York county, without consulting any of the directors, so far as I know, anyway, never myself. The Capital National Bank, or Mosher commenced sending money up there for his brother E. W. Mosher to loan for the Capital National Bank. In a little time it developed that that was being done. It was being done before any of us knew anything about it. There was then a protest against his sending money away from home to his brother to loan. And the outcome of the protest and the consideration that was given it in this directors meeting was an agreement, and an instruction to Mosher that that thing could only be continued if he wanted to endorse paper for the amount of money that was sent to E. W. Mosher to loan for the bank. These Mosher notes that were there in the bank were not a liability of E. W. Mosher's at all except as I have related. The money was loaned for the bank and E. W. Mosher's note was sent there each time money was sent to him to loan and that note was endorsed by C. W. Mosher and to all of that was collateral on which the money was loaned in York county. I don't think E. W. Mosher ever owed the Capital National Bank anything, or much of anything. If he did, I didn't know it.

Q. What was the explanation of sending the money there, that was given to you as a director, at the meeting that you refer to, by Mr. Mosher?

1147 A. The reason was a good one, and the only one that the directors finally consented to the thing continuing, that a larger rate of interest could be gotten in those western counties than could be gotten there in Lincoln for their money, that was the first explanation that Mosher gave, and it was because of that that the directors finally agreed to its continuance, on his agreement to stand himself, liable.

Q. Have you given the explanation then of how Mr. E. W. Mosher and C. W. Mosher happened to be on those notes?

A. Yes I have.

Q. What did you know about this "Small" transaction that is mentioned also in some of the testimony, and also in this identical letter?

A. Well it was a matter of discussiom more than one at our meetings there in the bank. I think I know all about it.

Q. You may state.

A. Small was a banker at Fairfield down in Clay county running

a little private bank, I think it was a private bank, I don't think it was even a state bank, and he was doing business with the Capital National Bank in Lincoln, and he finally failed, and when he failed he turned over to the Capital National Bank a lot of lands, deed to the lands and a lot of horses, he was running a horse ranch down there, to secure the Capital National Bank. Somebody questioned the right of the Capital National Bank to take that land on a straight deed. There were a lot of mortgages on the land and the Capital National Bank was carrying it, and expected to pay
1148 the mortgages out and, become the owner of the land, and with that and with the horses to pay the debts of Small to the bank. But somebody questioned their right to do that, and took the thing into court and the outcome of that was that those deeds were simply mortgages held by the bank as security for its loan and the court ordered the land sold and the Capital National Bank paid, and Small's equity was to go to the balance of his creditors. And the Capital National Bank never lost anything on account of the "Small" loan. I wouldn't say positive that they never did, but if they did, they didn't lose much, it was very little.' And the reason I say, I think they never did was because I remember very well of both Mosher and Outcalt saying that there never would be any loss there, but if there was it would be so little that it would be of small consequence.

Q. Did you ever make any entries upon any of the books of the bank?

A. Never one.

Q. Did you ever order, or direct any person whomsoever, servant or otherwise of the bank, to make any entries of any character upon the books of the bank?

A. No, never one, never.

Q. Ever issue any certificate of deposit on behalf of the bank, or request anyone else to do so. For just your mere order?

A. Never, I never did anything for the bank except to meet with them as a director and consider things that were brought
1149 to our attention and to help elect the executive committee and officers.

Q. What if anything, did you know in the year 1891 about any certificates of deposit having been issued on account of the Nebraska Relief Fund.

A. Nothing at all.

Q. What if any, knowledge did you have prior to the suspension of the bank that any false entries of debits or credits were entered in any account on the books of the bank by any officers or servants of the bank?

A. None at all.

Q. What if any knowledge did you have in any instance, of any varying between the amount of any certificate of deposit issued by the bank or any of its officers, and the corresponding entry of the amount upon the bank's books, what if any discrepancies if any, in that respect did you know about?

A. I never had any knowledge that anything was wrong there

until after the bank closed, and my first information came from Griffith. I met him on the train almost immediately after the failure of the bank, on the train between Lincoln and Ashland.

Q. When did you meet Griffith with reference to when the bank failed?

A. Griffith, I think live- in Wahoo. What I want to do, if I may be permitted to do it is to say what I said to Griffith at this time, and having a right to do it, as I think because of
1150 what I said to him, and what he said to me before the failure of the bank.

Q. This information came to you subsequent to the failure of the bank?

A. Yes sir.

Q. Did you know about any irregularities or false entries of any character whatever prior to the suspension of the bank?

A. None at all.

Q. An alleged stat-ment has been produced here, purporting to have been made to the Comptroller of the Currency and published, and to have been signed December 15th, 1892 by C. W. Mosher, R. O. Phillips and verified by R. C. Outcalt, on the condition of the Capital National Bank at the close of business December 9th 1892 what part if any did you take in the preparation or publication of that stat-ment?

A. None at all.

Q. Were you counseled about it in any way?

1151 A. No sir.

Q. Do you have any recollection of having signed a statment to be forwarded to the Comptroller of the Currency, purporting to give the condition of the bank at the close of business December 28th, 1886?

A. I have no recollection that I did, and I think I did not.

Q. Now I want to ask you Mr. Thompson, if you have any recollection of having signed or ever signing a copy of a notice to be published sent to a newspaper and published of signing your name to any such a notice?

A. I never did that.

Q. If any copy of that kind bore your name, you did not put it there?

A. No.

Mr. Rose: That is all.

Cross-examination.

By Mr. Thomas:

Q. You signed various reports of the condition of the bank while you were one of its directors?

A. Yes, I think I did.

Q. And do you know how many papers you signed in that connection?

1152 A. Of all kinds do you mean?

Q. At any one particular time, that a report of the con-

dition of the bank was made, how many times did you have to sign your name as director with regard to that particular report?

A. I think only once.

Q. Are you positive of that?

A. You say how many times would I sign one of those reports?

Q. Yes.

A. I think I would sign it but once.

Q. What is your bank in Aurora?

A. A State bank.

Q. How many reports are made when the Comptroller calls for one at a certain day, do you know how many papers are made out with reference to that report?

A. No, I do not.

Q. Don't you know that you have to sign your name more than one time in connection with making a report of the condition of a bank?

A. I think not, unless there is a duplicate of it, or something of that kind.

Q. Don't you remember that you had to sign your name to a report on this form? (Counsel exhibits to witness a paper.)

A. Well if that is a report. Now isn't that,——

Q. Do you remember of signing one of that form?

1153 A. I don't pretend to say that I never signed any of those reports, and I think is the correct form of those reports, that is my judgment.

Q. Do you say that you did not sign a report of the condition of the Capital National Bank to the Comptroller under date of December 28th, 1886?

A. I think I did not, and I will tell you why.

Q. You may state.

A. Well that is rather a long story but this is it. In 1885 I went to Europe a very sick man, so sick that nobody thought I would come back alive. I got back in the early winter of 1885 and during the next year this road here was under construction from here up to the northwest. I had charge of the construction. In the early winter of 1886 which was as I can best remember along about January or December we were blockaded with snow up in there and I was away for a long period of time and that came very near doing me up again. It came very near costing me my life, but at the same time I was up there attending to my business. Now I expected to be able to produce the records of the railroad company to show whether or not I was in Lincoln, but all of their records have been destroyed up to 1894 in regular conformity to their rule to destroy everything that gets so old. So all I have is my recollection and my recollection is based upon the conditions as I remember them of the winter of 1886 and 1887 during those months. I know that winter

1154 came very near finishing me, I didn't expect myself to get out alive.

Q. But you remember of having signed other reports?

A. I signed them whenever I attended a meeting, I always signed them if they were brought to me. I say when I attended a meet-

ing,—The directors at a meeting didn't always sign, because the requirements of the government didn't require all of the directors to sign, but whenever I was there and it was presented to me, I always signed them.

Q. But you didn't examine the assets of the bank to ascertain if the report correctly stated them?

A. I was always willing to sign any stat-ment of the condition of the bank from the representations that were made to me by the Executive Committee and the officers of the bank. I couldn't if I had wanted to have done so, made an examination into the condition of that bank and told anything about it, because I know absolutely nothing about bookkeeping, and I did there pre-
1155 cisely what I have always done with the different kinds of business I have been associated with and at the head of. Now I have been at the head of some very large institutions in this state and what I did there, I have always done.

Q. In your bank at Aurora you never examined its notes?

A. I never examined a note as long as I have been President of that bank, we have an executive committee as they did in this bank.

Q. You have never looked at the assets yourself?

A. I never have, the only thing we look at there, is when we have our annual or semi annual meetings the notes that are considered questionable are brought on the table by the committee and discussed and at that time we settle what shall be done with them.

Q. And if the men who were managing that bank were so disposed they could put in fraudulent paper and you wouldn't know it?

A. Yes sir.

Q. And they could issue certificates of deposit for one amount and have the books show another one and you wouldn't know it?

A. How could any man tell that.

Q. And they could issue certificates of deposit for one amount and have the books show another amount and you wouldn't know it?

A. Yes and for all any man in the bank might know.

Q. And so far as you know the bank at Auroro of which *are* are President may be at this time wholly insolvent?

A. It may be if the men there are thieves like Mosher and Outcalt, it may be in the same condition.

1156 Q. And do you sign stat-ments of that bank?

A. I have signed them just as reported to me by these five men.

Q. Then you sign these reports and take these men's words for it, and send them out to the world as correct?

A. Yes and you do to-.

Q. You sign your name irrespective of the facts you don't know what the true conditions are.

A. How could I know better?

Q. Will you please answer the question?

A. I am answering the question by asking you one.

Q. I simply want you to state this that you are signing stat-ments of the condition of that bank and are taking some one else'- word entirely for the truth or falsity of the report?

A. That is what I am doing, and I couldn't do different if I tried.

A. And that is what you did with the Capital National Bank.

A. Yes sir.

Q. And you didn't know at that time whether the report was true or false.

A. I couldn't have known.

Q. You didn't make any effort to find out except by asking some one else?

A. I am going to answer that question right or not at all now.

Q. I have a right to an answer to that by Yes or No. You didn't make any effort to find out except by asking someone else. Can you answer that question by Yes or No?

A. That question cannot be answered by Yes or No, because I did not ask someone else, they made their regular written statements of the condition of that bank, and it was from that that I knew the condition of it.

Q. Can you produce any of those written stat-ments?

1157 A. No sir, I don't suppose I could.

Q. The records of the meetings do not disclose that any such report was made.

A. I presume the record of the meeting would indicate the action of the executive committee.

Q. Were you there when the minutes were read and approved?

A. I would think that the records of the meetings would show that the executive committee had examined the assets of the bank and found them so and so, that would be my recollection of it.

Q. You never looked at them yourself?

A. No sir.

Q. You never looked at the cancelled certificates of deposit?

A. No, I never did, and how could I tell if a certificate showed $641.00 and the records showed $1641.00?

Q. Do you suppose that a certificate of deposit actually issued, that the certificate had been issued for $100,000 and the records showed $5.00?

A. How could I tell?

Q. Suppose that certificate has been paid and is in the bank do you suppose you could compare them and see if they agreed in the amount and name?

A. Yes but I will venture to say that a man that would do such a thing as that would not be apt to leave it where I could find it.

Q. Do you remember of signing reports of the kind I hand you here? (Handing witness a printed form.)

A. What is this?

Q. A printed blank sent out by the Comptroller of the Currency.

A. Is this the report that goes to the Comptroller?

Q. Yes sir.

1158 A. And the other is to-? Well if you have got one of those things that has my signature on, I would like to see it.

Q. Will you swear that you ever signed one?

A. I will swear that I have no recollection of it, that thing there (indicating) is a regular stat-ment, I think, to the comptroller.

Q. Don't you remember that every time a report is made of the condition of a bank, that you make out a detailed report, and at the same time also a brief one, like this one I show you, and the last one I show you contains the proof of the printer showing that it has been pu-lished, before it is sent in to the Comptroller.

A. I don't think I ever signed a report of that kind.

Q. Will you swear you never signed one like that?

A. I swear that I have no recollection of it. I have no recollection of signing any reports to the comptroller except one. This one I have no recollection of ever seeing it before.

Q. I refer to Exhibit No. 972 and I will read this to you, "The banks are respectfully notified that by law their published reports must be copies of the originals, and they must therefore state separately the amount of deposits subject to check, of demand and time certificates of deposit and of certified checks outstanding. Certificates of Deposit representing money borrowed must be included in and published as Bills Payable. Failure to do this may subject a bank to the expense of republication." Do you remember seeing that on any report?

A. No sir, I don't think I ever saw any report of that kind. I will also tell you that I am giving you my recollection, and I will give you my opinion if you want it.

1159 Q. I will ask you this question,—when you were asked by any of the officers of the Capital National Bank to sign reports you signed them didn't you?

A. Yes when I was there, I will say I did.

Q. That is when the Comptroller would make a call for the condition of the bank at any particular day, then the officers, or some one connected with the bank would make out the necessary papers and you would sign them at that time.

A. Yes I never refused to sign a stat-ment of the condition of the bank.

Q. And whatever papers the Comptroller required to be signed by the Directors with reference to that particular report, you signed?

A. No I wouldn't say that.

Q. Will you say you did not?

A. I will say this. This thing here is a stat-ment of the condition of the bank that goes to the Comptroller, now would an officer of a bank consider that he was committing a forgery for illustration if he were to sign some man's name to that thing there that is for publication. I mean exactly what I say, I have no recollection of ever seeing that form. I don't think I ever did. I don't think, ever I saw a form of that kind.

Q. Are you acquainted with National Banks, you were connected with this one for a number of years were you not?

A. Yes sir.

Q. And you were a director?

A. Yes sir.

1160 Q. You knew the Comptroller required reports?

A. Yes sir.

Q. You knew these reports were published.

A. Well sir, you may smile at my ignorance, but I never knew until you read that, that the Comptroller required them to be published. I knew that the banks published them but I thought it was for their own convenience.

Q. You thought it was just for the purpose of advertising?

A. I don't think I ever thought anything about it.

Q. You never knew before that the Comptroller required these to be published?

A. No sir.

Q. You thought it was just an act of the bank itself?

A. It would be a natural thing to do.

Q. You see banks right along, every time a report is called for, publish their condition?

A. Yes sir.

Q. And you noticed these attested by the directors?

A. Yes sir.

Q. And signed by some officers of the bank.

A. Yes sir.

Q. And yet you thought all this time that it was an act of the bank itself.

A. I never thought anything about it, there has not been any reason why I should have given that any weighty thought, my banking experience is nothing at all. Now while I have been President of this little bank up here at Aurora ever since its organization if I went into that bank today and tried to tell from the books what the condition of the bank was, if my life depended upon it, I couldn't do it.

1161 Q. Notwithstanding, you are willing to sign your name to reports and let people believe them.

A. Let me tell you this Mr. Lawyer, I don't know how many banks there are in this town, but I will just wager you a new hat, I will just bet you that there are not three directors in this town, that can tell you anything about their banks.

Q. You want to say that with regard to any directors do you?

A. Any that has not been educated, except the men in the banks whose business it is to know. Directors do not know these things as a rule, if you require a director to be an expert bookkeeper you couldn't get enough men in this country to serve as bank directors.

Q. You could tell if a column of figures were footed up right.

A. I might laboriously go through a column of figures.

Q. I suppose you could tell if a knife had been used on a book to scratch out figures?

A. Of course, I am not trying to protect myself from anything that legitimately belongs to be to bear, but I am simply trying to tell you things that you already know Mr. Thomas.

Q. I believe you said that you didn't know that the bank ever carried any paper of C. W. Mosher's.

A. It never came to my attention at all that Mosher had any paper in the bank, I never had any means of knowing it, and I have no recollection of hearing anybody say that he had.

Q. And you didn't know that they carried any paper of Outcalt's?

A. No I never.

Q. You didn't know that they carried any paper of the Western Manufacturing Company No. 1 of which Mr. Hurlbert was Manager?

1162 A. Well no, and if I understand that thing, I question if anybody could have told, I understand all those notes were carried by numbers there instead of in the name of anybody.

Q. You claim that you didn't know that there was such paper in the bank?

A. I did not know it, no sir.

Q. You claim you did not know anything about this Relief fund certificate of deposit?

A. All I know of that Relief fund is that the Legislature passed a law appropriating that much money and that Mosher was treasurer of that association, that is all I know.

Q. And you never inspected the books of the Capital National bank yourself?

A. No sir.

Q. Never looked at them for a moment in your life?

A. I don't think I ever looked at them at all, I know I never did.

Q. Never examined any of the accounts in there?

A. No.

Q. Did you have any of the bookkeepers examine them?

A. No.

Q. You have had a number of bookkeepers in your employ in the enterprises in which you have been interested?

A. Yes but I never used them to examine books of other concerns.

Q. Then you don't know how accounts were carried on the books of the bank.

A. No.

Q. And if there was an account on the books known as "C. W. Mosher, Tr." how do you know what it was?

A. Mosher was treasurer of the insurance company.

1163 Q. You don't know but what he may have carried some such a fictitious account?

A. No, I do not know.

Q. You don't know, you never examined the books.

A. No.

Q. And you don't know but that such an account may have been carried on the books that the insurance company had nothing to do with.

A. I wouldn't be surprised at anything that Mosher may have done.

Q. And you say that all the checks that were written on that fund, that account of the insurance company, were written by yourself?

A. That will take a little explanation. The insurance company's

account was absolutely under my control, but the Secretary in the office had authority to sign checks. The company's account was absolutely under my control, but the Secretary in the office there had authority to sign checks.

Q. But you didn't sign checks?

A. I did when there was occasion for it, but not as a rule. I had the right to do it, if I wanted to, but I delegated that right to this other man, he was always in the office.

Q. And you delegated your right to an investigation of the assets of the bank to this committee, I believe you said.

A. That is just what I did.

Q. And paid no further attention to it.

A. I couldn't if I tried to.

Q. Well you didn't.

A. I did not, no sir.

Q. Was Dr. Hamer on that committee at one time?

A. Dr. Hamer succeeded Mr. Holmes a short time before
1164 his death.

Q. Did you know that the bank at that time was carrying a large amount of overdrafts?

A. No, that never came to my attention in any way except at one of the directors' meetings. I remember the question of some overdrafts the bank had came up there, and Mosher was told to see that it was reduced.

Q. Your bank at Aurora has overdrafts?

A. No bank in existence is without overdrafts.

Q. I say your bank at Aurora has overdrafts?

A. Yes sir.

Q. The books show them?

A. I suppose so.

Q. You don't know?

A. I don't know, but I know the stat-ments they send to me has overdrafts.

Q. And do you publish them as overdrafts, or do you class them as Bills Receivable?

Q. The Capital National Bank has overdrafts, you say?

A. It never came to my attention but once, the overdraft account.

Q. Well the stat-ments never showed it did they?

A. I don't remember.

Q. You don't know that they ever did.

A. Now you might very honestly do that thing in two ways, it might be regarded as a loan, even if it was an overdraft.

1165 Q. You know the law requires them to be stated as overdrafts and not as a loan.

A. I do not know that the law requires that they shall be so published.

Q. And did the Capital National Bank have any rediscounts?

A. The conditions are just these, I have never been educated in a way that I could know anything of bookkeeping, we had an executive committee there on whom we all depended, that execu-

tive committee was made up,—those men were the best men of that town and men who had made the most money in that town, and we had a right to depend upon them.

Q. You say the bank sent that money out to Ed. Mosher and took his note for it, about the York county loans?

A. When the question came up as to permitting that thing to go on.

Q. I am asking you the manner in which it was done, did the bank send the money to Mosher to loan?

A. Yes.

Q. And took his note for it.

A. Took his note, but that note was,——

Q. Was Stark & Mosher running business for the bank at York?

A. Stark & Mosher ran a business for themselves previous to the time that Mosher was loaning money there for the Capital National Bank.

1166 Q. They money was sent to Stark & Mosher or both of them or either of them to loan for the bank?

A. It was sent to Mosher I think.

Q. It may have been to both?

A. I think not.

Q. You are positive that they did not?

A. I think not.

Q. And the notes of Mosher would be taken for the amount of money sent by the bank?

A. The Capital National Bank loaned through Mosher to the people who borrowed the money, but in order to comply with the requirements of the directors there, after it was found out that that was being done, Mosher's notes were sent for these various loans and that note would come in and be endorsed by C. W. Mosher and simply held there, it wasn't an obligation of E. W. Mosher except that it showed in a clean clear way that this much money was loaned and Mosher's note stood for it while the loans were being made up there, and at intervals the paper for the loan would come in, and then as they were paid off these notes were cancelled say when five thousand dollars was paid off in these farmers' loans up there, that five thousand dollar note of Mosher's would be taken up.

Q. And what would become of E. W. Mosher's notes when those were taken up?

A. They would be returned to him, I suppose.

Q. Well do you know that?

A. I do not know it, what become of the old note.

Q. I am asking you if you know what become of the note of E. W. Mosher when those other notes made by the parties who ultimately borrowed the money, were sent to the Capital National Bank.

1167 A. The notes of Mosher would not be altered by the notes that would be sent in of the men to whom the loans were made directly until the loans were paid because the notes of E. W.

Mosher there were sufficient to cover the full amount of money that was sent up there for him to handle for the bank.

Q. Do you know how these notes were entered on the books?

A. No sir.

Q. You don't know but what they were entered as Bills Receivable?

A. I presume they would be.

Q. And when the notes of those parties to whom E. W. Mosher loaned the money came in, would those notes be entered in the books of the bank as Bills Receivable?

A. I think not.

Q. Well do you know?

A. No.

Q. For all you know they may have been entered up as Bills Receivable.

A. I know this, that the other was the understanding of the way in which that business should be handled.

Q. Is that all you know about it?

A. Yes sir.

Q. You made no inquiry to see whether it was being done that way or not?

A. No the executive committee was looking after that.

Q. All the members of the executive committee that is those who were on the committee while the bank was in existence, are now dead?

A. Yes they are all dead.

Q. And the discount committee the same?

A. They are all dead.

1168 (By JUROR:)

Q. There is one thing in regard to those notes, when they were first given, of E. W. Mosher's signed by C. W. Mosher to secure the money that E. W. Mosher had got to invest for the Capital National bank, do I understand you to say, when that money or the collateral for that money was returned, that those notes were void?

A. For illustration, say five thousand dollars was sent to you by Mr. Jones here to loan for him, I don't know where you live, I don't know your name, with the understanding,—now of course when that money first comes to you, it has got to be loaned, unless previous arrangements are made for the loaning of it. Supposing five thousand dollars is sent to you to loan. I think I can make you see what I mean. Now when that money comes to you your are serving as an agent of Mr. Jones and you loan that money, you loan one thousand here and one thousand there and five thousand some other place. As you take these notes, well first when the five thousand dollars is received you send him your note of five thousand dollars.

(By JUROR:)

Q. He would have my note and have it secured.

A. He would have your note and have it secured. In this way

that note is given simply as the agent of Mr. Jones, you didn't borrow the money yourself, but it is sent to use for him, his agent. Now when you take these smaller loans, you send those in to Mr. Jones and he holds them there simply as his loan, that is what his money is loaned on, but in order that he may not have so many little loans and to comply with the instructions of his directors, he carries your note as an asset of the bank on which this money is loaned instead of entering up all those little notes that are the real loans. There is nothing wrong in that.

1169 (By JUROR:)

Q. Do you know that they didn't carry those mortgages as assets of the bank, do you know that they didn't? This is the way I have it, supposing they had those notes of E. W. Mosher's with C. W. Mosher supposed to be one of the best men in the state, as security for that—if I understand you right it was real estate collateral that was sent back, was it?

A. It was loaned on various things. I don't think it was all real estate.

(By JUROR:)

Q. Supposed to be first class collateral.

A. Yes, and sent back to the bank and held there until enough should be collected on any of this paper that money had been loaned on to make the amount of one of E. W. Mosher's notes. And I suppose his note was cancelled.

(JUROR:)

Q. Do you know that to be the case?

A. No but I know that was the instructions, and the only way that the directors consented to that thing continuing up there.

(By JUROR:)

Q. You see if they didn't cancel and send it to Mosher that would stop the hole both ways, both coming and going and leave Mosher out. The fact of the business is they had two loans instead of one to start with,—the reports never showed that those notes were cancelled did it?

A. This executive committee was a part of the directory and the directors instructed how that thing might be done, and it must have been done as they directed it should be done otherwise this executive committee would have stopped it, so it must have been done in that way, but personally I couldn't say, that is from personal knowledge, from my own individual knowledge as to just what was done.

1170 Q. Now I will ask you, you were speaking about this Donnell, Lawson *A* Simpson account, you say you had talked to Mosher and Outcalt at the time you went into the Capital National Bank about it?

A. No I did not say that.

Q. What did you say?

A. I said that the time the bank was changed that thing came up.

I did not mean myself as an individual, it was a subject of discussion at the first regular meeting there at first, at the organization.

Q. You had a talk with them, didn't you, you took part in the conversation?

A. Yes but what I mean it wasn't individual talk of mine with them at any time except at that regular meeting.

Q. You say they told you they would take care of that?

A. Yes, they said this "that is not an account that belongs in here and we have an arrangement with Donnel Lawson & Simpson and Outcalt and I will take care of that account" and they afterwards did they took it out of there and took care of it.

Q. How did they take it out?

A. I don't remember.

Q. When?

A. It was evidently done about that time.

Q. About the time you talked about it?

A. I suppose it was.

Q. Do you know anything about it?

A. Well I know this, that Mosher and Outcalt were given by Donnell, Lawson & Simpson a lot of bonds in Kansas City Water works bonds and a lot of land for their indebtedness to the Marsh bank, and Mosher and Outcalt were the owners of that property and the bank had nothing to do with it at all. Mosher and Outcalt
1171 made the statement there at the time of the organization of the bank, but that wasn't anything that belonged in the Capital National Bank and they would care for it, but when it was cared for, I couldn't tell.

Q. And did you ever examine the books to see if that was cared for?

A. No.

Q. Do you know that Mosher and Outcalt ever paid a cent into the bank on account of that loss?

A. I think if they hadn't done it the executive committee,—— .

Q. I am asking you as to the fact, if you have any knowledge as to whether Mosher and Outcalt paid anything into the bank on account of that loss.

A. I never saw them pay anything.

Q. And you never investigated the books.

A. I never investigated the books.

Q. Were you there when the Kansas City bonds were turned over to them?

A. No the bonds would not come to them in the bank.

Q. It didn't have anything to do with the bank?

A. Not at all.

Q. The bank didn't get anything.

A. Not at all.

Q. Get any of the land?

A. Not that I know of.

Q. About all you know about it then is that Mosher and Outcalt told you.

A. I told you in my direct testimony that that question came up

there at the organization of that bank, in checking over the stuff, I didn't do the checking but it was done there by the men that were there in the meeting at that time, of the stuff that came into the bank. That was some of the stuff that the old bank had.

1172 Q. Was it in the form of notes?

A. I think it was in the form of notes, I don't remember as to that.

Q. Well it would have to be in order to be checked over.

A. I don't know what it was, it must have been nothing at all except an account.

Q. It was either an account kept on the books at that time, or notes of those parties.

A. It evidently was either notes or an account kept by the Marsh Bank, and at the time of the transfer to the Capital National Bank was a subject of the scrutiny of the men that were doing that, and Mosher and Outcalt. And at that time, Mosher was the spokesman, I remember that very well he said this is something that don't belong here that bank has failed.

Q. That was immediately upon the organization of the Capital National Bank that is when it became in name the Capital National Bank.

A. That was just about the time that bank had failed, Donnell, Lawson & Simpson had failed just a few days before, so there was nothing irregular in having that thing provided for in the organization.

Q. And you think the conversation came up at that time, you were looking over the accounts to know the condition of things, and this matter came up, of Donnell, Lawson & Simpson and they told you that that ought not to be in the bank and that they would take care of that?

A. Yes sir.

1173 Q. So far as you have testified, do you know what you have testified to as being correct?

A. Yes sir.

Q. Do you know that it is true?

A. I know what I have testified to as having been said is true. I couldn't say as to what the books may show relative to that because I never inspected them.

Q. And as I asked you a while ago, from personal knowledge you don't know what Mosher and Outcalt did do with that account as it stood upon the books of the bank.

A. No, but certainly the fellows that were handling those accounts there Mr. Holmes and Mr. Stuart ought to have found it.

Q. You are reasoning that, and not testifying from personal knowledge.

A. I couldn't testify as to anything on the books, as to my personal knowledge.

Q. Can you testify as to any of their acts?

A. I can testify to that the same as I could if you said you would go down to the Windsor Hotel and be back in ten minutes, but I wouldn't know where you did go.

Q. I may have gone to "The Irrigator."
A. Yes sir.
Q. And you would be willing to testify that I had gone to the Windsor.
A. I would be willing to testify that you said you were going to the Windsor.
Q. And you say you were diligent in attending Directors' meetings?
A. When I was there I don't think I missed any of them.
Q. And helped declare the dividends right along.
A. I guess I did my part. The stat-ments always showed
1174 what was earned and what there was net.
Q. And you took the stat-ments for it?
A. I took their stat-ments for it, yes.
Q. You haven't offered any of those stat-ments in evidence.
A. I haven't any idea they were ever kept, because they are things that a person would hardly keep.
Q. I believe you said you became Vice-President of the American Exchange Bank.
A. Yes sir.
Q. And President of the Aurora Bank?
A. Yes sir.
Q. You were Superintendent of the B. & M. for a number of years?
A. Yes sir.
Q. Something like eleven hundred miles of it?
A. Yes sir, I built the most of it.
Q. And you are President and organizer of the Farmers' Insurance Company?
A. I was Vice President of it. I was President commencing with 1888, but I had no active part in the management of the company until 1890. I was Vice President from 1885 to 1888 and President from 1888 until it was sold out a couple of years ago but I had no active part in the management of it until 1890.
Q. You were saying something about a loan called the Small loan, had the bank loaned money to Mr. Small you say and taken his note for it?
A. Yes, I think he was doing a regular business, his little bank there, and the Capital National Bank had loaned him quite a large amount of money and when he failed why, he secured them in the way I spoke of.
1175 Q. He gave the Capital National Bank, a mortgage or deed to some lands?
A. I think he gave them deeds to a lot of lands that had mortgages on.
Q. And also a Bill of Sale to personal property?
A. Yes, some horses.
Q. And the land that he deeded had prior mortgages on?
A. Yes sir.
Q. The Capital National Bank assumed and paid those?
A. The Capital National Bank paid those, and expected to own

the land and to cancel the debt, that is the land, and what they got out of the horses, and they paid the mortgages on this land, and somebody took the thing into court and the court decreed that their deeds could only be considered as mortgages and ordered the land sold, and if there was anything left after paying the mortgages it should go to Small.

Q. Was there any equity left?

A. I think not.

Q. You say the bank didn't lose anything on that transaction?

A. I said, I thought it lost very little if anything, it may have lost a thousand or so dollars, I am not quite sure about that, but I remember the thing was considered safe.

Q. You say you were in Indiana when the Capital National Bank failed?

A. I was in Terra Haute. Stull and I were over there trying to buy the Terra Haute Gas company, I know I got a telegram there.

Q. And you say you were astonished that the bank had failed?

1176 A. Considerably so, yes sir.

Q. Never had any intimation or suspicion of it?

A. No, I did not.

Q. Always thought the bank was solvent?

A. I had $28,000.00 in there that I would have gotten out in some way, if I had thought it wasn't.

Q. You thought the bank was solvent?

A. Yes sir.

Q. You thought it was doing a flourishing business?

A. I had no reason for thinking it was doing a losing business.

Q. Why did you sell your stock?

A. On account of personal trouble with Mosher.

Q. But you never questioned Mosher or Outcalt's honor?

A. No sir.

Q. Their notes would have been good for quite a considerable amount?

A. When the bank closed, the bankers told me, after I got back to Lincoln, that they wanted to let them have money to keep the bank open and Mosher wouldn't do it.

Q. I suppose their notes for $150,000.00 either of them, would have been considered good?

A. I would think so.

Q. Without security?

A. I would think so.

Q. You sold some of your stock to Mr. Mosher didn't you?

A. Sold it to Mosher in 1891 some of it to Mosher and Outcalt together.

Q. Did you take any security for it at that time?

A. I did, but I offered to let them have it without security and Mosher says No I will give you security, & he said "I would

1177 rather give you security for it."

Q. What did they give you as security?

A. Gas company stock.

Q. Notwithstanding they were reported to be millionaires you were willing to take security.

A. I would take that from even you.

Q. You say Mr. Mosher insisted upon giving security?

A. I didn't put it that way. I will tell you the transaction if you want to know it.

Q. Did he volunteer to give you the security?

A. He did. I offered to take his and Outcalt's note without any security for my stock for $22,500.00.

Q. Didn't that excite your suspicion, that he wanted to give security, when a man that is worth a million wanted to give security for that amount?

A. I wouldn't think so. I am not a millionaire, but I never borrowed a dollar without giving security, I want them to take it because I want them to take something that is good.

Q. And that didn't excite your suspicion?

A. Not at all.

Q. And that is all the security you took?

A. I took 350 shares of Gas stock, $35,000.00 face value, it was worth about 60¢ at that time.

Q. Did you sell any stock to Mr. Outcalt?

A. Yes some issued to Mosher and Outcalt. The transaction was done through Mosher but Mosher and Outcalt both signed the note.

Q. Did you take a mortgage from Mr. Mosher on or about the 27th day of December 1892?

1178 A. Yes I did. I will tell you about that if you want me to.

Q. And did that include two onyx top gilt tables, one mahogany table, 1 mahogany cabinet, 1 blue satin corner chair, 1 gold colored reception chair, 1 oval back red and gold easy chair, 1 large upholstered velvet trim-ed lounge, and other things of that character?

A. Now I will tell you about that. That was while I was in Terre Haute Indiana, and while I was there it became evident that that bank was going to fail, and they took this chattel mortgage over and gave it to Mr. Mullen, my secretary, and I never knew anything about it until I came back, when Mr. Mullen gave me those papers, and I said to him, "you take those papers back to them and tell them I am not in the chattel mortgage business."

Q. Mosher voluntarily gave you the chattel mortgage?

A. That is just exactly what he did.

Q. And you didn't know anything about it.

A. I didn't know anything about it. I never exercised it, did I?

Q. Was it filed in the County Clerk's office?

A. I think it was filed before I came home.

Q. When did you leave for Terre Haute, Indiana?

A. It was probably Tuesday or Wednesday before the failure of the bank. It may have been a day or two longer than that. Stull and I went over to look over the Gas company there, I had a letter of credit in my pocket from John W. Walsh, President of the —— bank for sufficient money to buy both the Terra Haute gas plants if I could get them, and Stull and I went there to see if I could get them, that was our mission in Terra Haute.

1179 Q. Mr. Outcalt also gave you a mortgage dated December 24th, 1892 on a lot of personal property, including some horses, and timothy hay and oats and harness, and horse boots, and sulkies and a lot of other stuff on a farm about five miles south of Lincoln.

A. Yes sir, that was the same time when I was away and given to Mr. Mullen.

Q. And at the same time was there a lot of real estate deeded to you by Mr. Mosher?

A. Yes sir, I will have to tell you about that to-, whether you want to hear it or not. Now I held up until a couple of months or such a matter before the failure of this bank, this gas stock as collateral to my note. Mosher came over to my office one day and he says, "Would you just as soon have real estate security as collateral instead of gas stock" and I said "al- right" Mosher then gave me a lot of real estate security. When I sold that stock to Mosher I wanted him to understand and I felt it that he was welcome to that stock under the circumstances without collateral, but he said "I would just as soon give you collateral" and I took it. When this real estate was given to me it was given in exchange for that gas stock. I had no idea that he was preparing for trouble, but that is just what he was doing, what he wanted to do was to get something in his possession that he could handle.

Q. Were you here when the real estate conveyances were made to you?

A. Yes sir, but I did not think that ever there was any reason for going into that thing.

Q. As a matter of fact didn't Mosher deed to you the North west quarter of 24—9—6 Lancaster County, and did you recite the consideration as $10,000.00?

A. You mean Outcalt.

1180 Q. Yes.

A. Yes.

Q. And this deed was recorded January 23rd, 1893?

A. I presume very likely, because as I told you these things were given me as security in lieu of this gas stock that I surrendered.

Q. When that deed was recorded was you here?

A. Yes those things were in the possession of Mr. Mullen and they were not recorded, but when that thing came up, he sent them to the Court House, to be recorded.

Q. Did you instruct Mr. Mullen before you left?

A. No, I did not.

Q. He acted as your agent in recording those deeds?

A. Yes sir.

Q. And with your consent, he was attending to your business during your absence?

A. Not with my consent, but if I had been there, I should have done just as he did, but he knew I wasn't there and he wanted to have them recorded. That thing has all been gone over in court.

Q. And wasn't there a deed made to you conveying the North east quarter of 12—12—5 in Hamilton County?

A. Yes, that was all one transaction.

Q. And one for the South west quarter of 31—10—1 in York county?

A. Yes sir.

Q. The first deed recited $10,000.00 the next one $4,000.00 and the last one $4,800.00, is that correct?

A. I couldn't tell you as to that now. You know.

1181 Q. And another one re-conveying the title to the S. W. 31—10—1 York county?

A. I couldn't say the numbers you are reciting was right or wrong, but the whole transaction was as I have told you.

Q. How many pieces of land were included in that transaction?

A. I couldn't tell you.

Q. About how many?

A. You see that stuff all had mortgages on, my right in there was a right that I could only get by taking care of the property, and I don't think there was a single piece that didn't have a mortgage on except that piece in Lincoln.

Q. About how many acres were there?

A. Oh, I couldn't tell you about that, there might have been five or six pieces of land, I don't know.

Q. And there might have been ten or twelve?

A. There might have been I couldn't tell how many there were.

Q. You say when this deed from Outcalt was made December 29th, 1892 you were in Lincoln?

A. No, I did not.

Q. Didn't you just testify to that a moment ago, that when the deed from Outcalt was made to you that you were in Lincoln?

A. I don't think so.

Q. Well what are the facts?

A. I said that was given me, that this stuff up here was given me a couple of months or such a matter before the failure of the bank, in exchange for this gas stock.

Q. Isn't that deed dated, the deed to the N. W. 24—9—6 isn't it dated December 27th, 1892?

A. Yes it was and I will tell you why. When Mullen came to have that recorded he found that there was no date on it at all and I remember now of his telling me that he put a date on that.

Now the date,—I don't know what date he put on but there 1182 was a date filled in because there was a date belonged there.

The very fact that I exchanged that gas stock for land is pretty good evidence that I did not press those fellows, I would have given them the gas stock if they had come and asked me for it, but they gave me this stuff in lieu of it, but it afterwards developed that I was taking a lot on my hands.

Q. Well did you record any of those deeds until after the failure of the bank?

A. No I think Mullen recorded them all, sent them for record while I was away.

Q. While you were gone?

A. Yes sir.

Q. After the bank failed.

A. No I think this is what Mullen told me, when I came home that Mosher had come over and told him that those deeds that I held ought to be recorded and I think he sent them up for record before the bank failed, on Mosher's telling him that they ought to be recorded.

Q. Isn't *if* a fact that the Outcalt deed, the one just referred to was recorded on January 23rd?

A. I couldn't tell about that.

Q. Isn't it a fact that the deed to some Hamilton county land, was recorded January 18th, 1893?

A. That might have been.

Q. And wasn't there a deed to the S. W. 31—10—1 in York county to you executed by Mosher filed for record January 14th, 1893?

A. I don't hardly see how that could have been, and yet I would not say it wasn't.

1183 Q. You were here on or about the 14th of January 1893?

A. That would be nine days before,—I don't know that I wasn't.

Q. On that day didn't you make a deed to Mosher to the S. W. 31—10—1 in York County?

A. Yes, and I will tell you how that was done. When they gave me these first deeds, they afterwards came and wanted to exchange some other pieces for those, and that is the way that those exchanges were made. I deeded two or three pieces of land to them; that they had given me to take in lieu *to* the other land that they had deeded to me.

Q. And on or about the 28th day of December didn't Mosher and his wife, and Outcalt and his wife convey to you by deed the S. E. quarter and the south half of the north east quarter of 19—11—2 also the south west quarter of 13—12—2—all in York county, which deed was recorded December 28th, 1892?

A. Very likely that is right.

Q. And the consideration recited in there was $16,000.00?

A. Very likely that is right, because those deeds were given me in lieu of this gas stock and afterwards there were changes made and when I held that stuff as security, it was a question of whether I was willing to let the security go that they had given me, and take other security in place of it.

Q. On January 12th, 1893 you deeded to Mosher the south west quarter of 13—12—2 in York county for a consideration of one dollar.

A. Very likely, it was a transfer of securities.

Q. And on January 7th, 1893 Mosher and wife and Outcalt and wife, by deed conveyed to you the west half of the South east quarter of 20—10—2 in York county for a recited consideration of $1,000.00 which was recorded January 14th, 1893.

1184 A. Very likely, it was all the same transaction.

Q. And on January 18th, 1893 Mosher and wife by deed, conveyed to you the North west quarter of 19—21—1 York county for $4,000.00 consideration.

A. Very likely, it was all the same transaction. And I want you to understand what that was, that stuff was all security, there was none of that stuff mine, except it was a changing of security.

Q. I hand you exhibit No. 1059 and will ask you to look at that and see if that is a correct copy of a Bill of Sale which Mr. Outcalt gave to you.

A. I would say that it looks like some I found there when I got home.

Q. And exhibit No. 1060 is a chattel mortgage executed by Mr. Mosher?

A. I presume it is, I never kept this thing at all, I gave *to* to Mr. Mullen and told him to take it back, that I wasn't in the chattel mortgage business.

1185 Q. You testified that there was a date in one of those deeds that Mr. Mullen filled in.

A. There was a blank date.

Q. I will ask you if it wasn't in the chattel mortgage, or the Bills of Sale.

A. I couldn't tell about that, and I wouldn't pretend to say, which one it was in, but I know he told me there was a blank in one.

Q. Was it in the Chattel mortgage or the Bill of Sale, is that your recollection, or was it?

A. I wouldn't have any recollection as to which one he told me it was on, but I remember of him telling me that and asking me if he should fill in the date, and I told him I didn't see anything wrong in it.

Q. He testified didn't he in the case you had in court, that he entered it in the Clerk's office the morning that he filed it, or at the office?

A. I don't remember what he testified to.

Q. Wasn't you there, in an action with reference to this same property?

A. Where was it?

Q. Why it was an action, I think it was an action in which Mr. Whedon was defendant, one of the defendants and pending in the Supreme Court now.

A. If I knew what one it was he filled the date in, I would tell you.

Q. And do you say Mr. Mullen filed this Chattel mortgage and Bill of Sale that I have just referred to, during your absence?

A. Yes sir.

Mr. THOMAS: That is all.

1186 Redirect examination.

By Mr. ROSE:

Q. What date was it Mr. Thompson, that Mr. Mosher pledged to you this $35,000 of Gas stock?

A. It was November 14th, I think 1891. It was in November, and I think the 14th of November was the date of the note. It was a large note.

Q. And these chattel mortgages exhibit- No. 1059 and 1060 executed one of them by Outcalt and one by Mosher, you say were executed and left at your office without your knowledge at all?

Q. What is the fact about it?

A. They were both left in my office during my absence, and without my knowledge, and very much to my displeasure when I came home.

Q. What did you do with the mortgages in the way of taking possession or claiming any rights under it?

A. The mortgage for the horses was a mortgage on the personal property that was on a farm that they had given to me in lieu of this gas stock and that I took possession of and handled. I sold those horses to Judge Hayward, late Senator Hayward and C. E. Cotton, those two men bought those horses, the other stuff named in the mortgage, I don't know anything about it, that was sent back to Mr. Mosher with thanks, I didn't want anything to do with it.

Q. And never did have anything to do with it.

A. No.

1187 Q. And you say that when this farm was turned over to you this stuff was all on the farm?

A. Yes sir, all on the farm.

Q. And somebody had to take care of it.

Q. And when you made this deal way back in 1891 you say you were willing to take just simply their notes.

A. I did, and was very willing to take it.

Q. You thought they were entitled to credit for that much, up to the time of the failure, and more?

A. I was perfectly satisfied to take their note for $22,500 I did not question their ability to pay it, or their intention to pay it.

(By Mr. THOMAS:)

Q. You say you had a personal difficulty with Mr. Mosher?

A. Yes sir.

Q. About when?

A. That was the day that I sold him my stock, the very day that I sold it to him.

Q. And your relations were never amicable after that?

A. Well we spoke as we passed each other.

Q. You spoke as you passed by and that was about all.

A. Yes sir, that was about all.

By Mr. ROSE:

Q. Did you have any stock left after that transaction?

A. I had, $1,000.00.

Q. Did you have that on the failure of the *failure?*

A. Yes sir, I did.

1188–1198 Q. Did you pay the assessment on it?

A. Yes sir, I did.

Q. How much?
A. $1,000.00.

Mr. ROSE: That is all.
Mr. THOMAS: That is all.
Witness excused.

1199 Ex. 1059. O. P. H.

Bill of Sale.

51908.

Bill of Sale.

R. C. Outcalt to D. E. Thompson.

Filed Jan'y 23rd, 1893, at 8:30 A. M. J. D. Woods, County Clerk.

Know all men by these presents: that I R. C. Outcalt, of Lincoln, Nebraska, for and in consideration of the sum of $12,500 to me in hand paid by D. E. Thompson, do hereby sell, assign, transfer, and set over unto said D. E. Thompson the following described personal property, to-wit: One Stallion, called "Industry, bay color, small scrip in face, white hind ankles, foaled May 18–1886; One bay colt, small star, both hind feet white, foaled March 14, 1890, called "Burlock."

One dark bay mare, without marks, foaled May 1877, called "Edna."

One chestnut mare, foaled in 1877 called "Lena Carey."

One bay mare, star, two hind feet white, foaled April 1882, called "Bettie Medium."

One bay filly, one hind foot white, foaled 1887 "Alice McMahan."

One bay mare, hind feet white, foaled 1886 "Tremont Queen."

One bay filly, little white on hind foot, foaled 1887 "Merian."

One bay filly, blaze face, hind legs white, foaled 1887, "Lady Burnham."

Bay mare foaled 1882 "Dolly McGregor."

Chestnut filly, foaled 1887 blaze face, "Girly King."

Bay filly foaled 1888 "Jennie McAsham."

Chestnut filly, not named, foaled October 1889.

Bay filly, foaled July 1889, called "Gracie."

Bay filly, One hind foot white, foaled 1889 called the "Dutchum."

Bay filly, no name, no white, foaled June 9–1890 called the Drusefilly.

Bay filly, foaled May 17-1890.

Bay sucking filly.

1200 Chestnut filly, called "May Stoddard."

Chestnut yearling filly, called Kate Leonard.

Chestnut filly, foaled June 30/91, called Mary Beeber.

One bay filly, foaled June 7/91 called Emma De Forrest.

One dark bay filly, foaled Apl. 12/92 called Georgie Moore.
One bay filly called Brownie Bess, foaled Mch. 22/92.
One bay filly foaled Apl. 14/92 called Nashville Queen.
One bay filly, foaled Apl. 3rd 1892 called Louisa Burnham.
One bay colt, foaled June 22/92 not named.
One brown mare, 12 years old, called Jennie Lynn.
Five carts. (Road.)
One light wagon.
One hundred tons timothy hay, baled and unbaled.
Two thousand (2000) bushels oats.
All harness, horse boots, two sulkies.
Black filly, 2 years old.

All of the foregoing personal property being on the farm of the undersigned, about 5 miles south of the city of Lincoln, known as Grassland stock farm. To have and to hold the said property unto the said party of the second part, his heirs and assigns forever.

And I do hereby convenant to warrant and defend said property against the lawful claims of all persons whomsoever.

Witness my hand this 24 day of Dec. 1892.

RICHARD C. OUTCALT.

Ex. 1059. P. 2.

STATE OF NEBRASKA, *Lancaster County, ss:*

I, A. M. Truieble County Clerk of said County hereby certify that the above and foregoing is a true and correct copy of the or-ginal now on record in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County this 27th day of February A. D. 1899.

A. M. TRUIEBLE,
County Clerk.
WELLS, *Deputy.*

1201 Ex. 1060. O. P. H.

51904.

Chattel Mortgage.

L. P. Mosher and C. W. Mosher to D. E. Thompson.

Filed Jan'y 23, 1893, at 8:30 A. M. J. D. Woods, County Clerk.

Know all men by these presents; that we L. P. Mosher and C. W. Mosher, of Lincoln Nebraska, for and in consideration of $2,500.00 to us in hand paid, by D. E. Thompson of Lincoln, Nebr. the receipt whereof is hereby acknowledged have bargained sold and conveyed to said D. E. Thompson, his heirs and assigns the following mentioned goods, chattels and personal property to-wit: at present situated in the reception room in the dwelling house now occupied

by the undersigned, at the corner of Fifteenth and K streets, in the city of Lincoln, Neb. this property, viz.

2 Onyx top gilt tables. 1 mahogony table, 1 mahogony cabinet. 1 blue satin corner chair, 1 gold colored reception chair. 1 oval back red and gold easy chair, 1 large upholstered velvet trimmed lounge, one large upholstered velevet trimmed chair. 1 blue platform rocker. 1 brass reception chair. 1 yellow seated tete-tete chair. 1 hat rack. 1 small mahogony table, 1 marble statue called "Cat & Birt," 2 marble statues called "Dancing Boy & Girl" 1 large blue rug. 3 small rugs.

The following now situated in the library in said house, viz: 1 wall clock, 1 Corduroy upholstered lounge, 1 Marble top center table. 1 Copper revolving chair, 1 large rug. 3 small rugs, 1 silver ebonized image of Columbus.

The following at present located in the sitting room in said house viz:

1 Corduroy cushion, for window seat, 5 down pillows, 1 "Karmick & Bach" piano and stool. 1 blue upholstered arm chair. 1 willow rocker. 1 red willow chair. 2 red leather bottom rockers. 1 upholstered platform rocker. 1 large yellow rug. 1 student lamp.

The following at present located in the dining room and kitchen in said house, viz:

Ex. 1060. P. 1.

1202 1 large oak dining room table. 8 oak dining room chairs. 1 large rug. 3 small rugs. 1 gas range and fixtures. 1 Coal range and fixtures. 1 large ice box or refrigerator. 1 small gas stove and fixtures. All cooking and kitchen utensils, crockery, and table ware, chinaware all silver and plated ware all table linen, 1 large mirror over mantel.

Also the following at present located in south bed room, in said house, viz:

1 large blue rug. 2 small rugs. 1 large walnut bedstead with matresses, springs, bedding, pillows, sheets, blankets and covers of all kinds. 1 Walnut marble top dresser. 1 walnut top washstand. 1 set blue wash bowl and pitcher. 1 upholstered easy chair. 1 upholstered square chair. 1 onyx top, silver trimmed table. 1 statue "Three Graces, 1 red bottom chair, all combs, brushes handkerchief boxes in said ro-m.

Also at present located in west bed room, the following: viz:

1 large carpet rug, 2 small rugs, 1 brass bedstead with springs mattresses, covers and bedding. 1 large red upholstered platform rocker. 1 large red upholstered easy arm chair, 1 Red upholstered lounge. 1 large pier glass, 1 mahogony dresser, 1 upholstered rocker, 1 marble top table. 2 marble statues "Gladiators."

Also in the east bed room, in said house, the following, viz:

1 walnut bedstead with springs, matresses, covers and bedding, 1 walnut dresser. 1 cane bottom rocker. 1 blue and red upholstered corner cha-r. 1 small book case. Also the following chattels in said — viz: 1 blue hassack, all hall and stair carpets and rugs, iron bedstead with mattress and springs in girl's room and all bedding

therewith. Bedstead in man's room with
Ex. 1060. P. 3. springs mattress and bedding, all furniture in room occupied by hired man and furniture in room occupied by servants. 1 billiard table, with balls and cues, all curtains, window curtains and shades, portier-s and curtain
1203 fixtures, All gas and electric light fixtures. All mantel ornaments, clocks. 6 common chairs, 1 common rocker. All bath room furniture and appliances. The intention being to hereby sell and convey all the furniture and personal property in said house of every kind and description, save personal ornaments and clothing whether herein specifically enumerated or not, and excepting therefrom family pictures and personal presents; also the following other personal property now in the barn adjacent to said dwelling house: 1 phaeton, two seated; 1 light buggy, 1 pony cart, 1 small sleigh. 3 sets single harness; 2 sets double harness. All curry combs, brushes and horse furniture and belongings in said barn. 1 horse bay called "Doc"; 1 bay mare called "Cora." Said horses now being used by undersigned. 2 small ponies, called "Tom and Don. 2 Geldings now with W. H. Dorgan and bought of Church Howe at his auction held at fair grounds near Lincoln. 1 cow, 1 iron yard sette-. 1 iron yard chair. 2 iron porch chairs, 2 iron porch sette-s all yard ornaments. Lawn mowers, rakes, wheel barrows, yard and barn tools. To have and to hold said property unto said D. E. Thompson his heirs and assigns forever.

The conditions of this conveyance is that whereas heretofore the said D. E. Thompson, caused a certificate of stock of the Capital National Bank of the face value of $2000 being certificate No. 88 to be issued and delivered to said C. W. Mosher as Trustee for Lora A. Thompson said Mosher to hold said certificate and to pay the income thereof and dividends thereon to said
Ex. 1060, P. 3. Lora A. Thompson until she should arrive at the age of 18 years and then to deliver said certificate to said D. E. Thompson, his heirs or assigns. Now if the said Mosher shall pay to the said Lora A Thompson,
1204–1241 the dividends of said stock, which said Mosher guarantees shall equal $200 per year and when said Lora A. Thompson arrives at the age of 18 years, shall return said stock or its par value $2000 to said D. E. Thompson, and shall save and hold harmless the said Lora A. Thompson, from any loss whatever on account of said stock and shall pay to her said dividends or $200.00 per year until she arrives at the age of 18 years and shall then return said stock or its par value to said D. E. Thompson, then this instrument shall be void, otherwise in full force and effect. If the said D. E. Thompson shall at any time feel himself insecure or unsafe then he may take and sell said property either at public or private sale and from the proceeds thereof pay to said Lora A. Thompson the sum she would be entitled to, to be arrived at by multiplying the number of years that must elapse before she arrives at the age of 18 years, by $200 and pay said sum to her or to such other person as he may select for her and also to pay to himself the sum of $2,000.

In testimony whereof said parties have hereunto set their hands this 27 day of December 1892.
Signed in Duplicate.

LOUISE P. MOSHER.
C. W. MOSHER.

#51904.

STATE OF NEBRASKA, *Lancaster County, ss:*

I, A. M. Truieble County Clerk of said County, hereby certify that the above and for-going is a true and correct copy of the original now on record in this office.
In testimony whereof I have hereunto set my hand and affixed the seal of said County this 27th day of February A. D. 1899.

A. M. TRUIEBLE,
County Clerk.
WELLS, *Dep.*

[SEAL.]

Ex. 1060, P. 4.

1242 Mr. DEWEESE: I now offer in evidence the record of the proceeding in the United States Circuit court, being Exhibit "U" duly certified to by the Clerk of Lancaster County District Court, and the clerk of the United States Circuit Court, and the mandate of the Court of Appeals.
Mr. THOMAS: The plaintiffs object to that as incompetent, irrelevant and immaterial, not properly authenticated and no sufficient foundation laid.
Objection overruled.
The plaintiffs each separately except.
Def'ts Exhibit "U" received and read in evidence, as follows.

1243 THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Copy of Motion and Ruling Thereon, Demurrer, Ruling Thereon and Mandate.

Be it remembered, that on the 18th day of January 1894 a Motion to Remand was filed in the Clerk's office of said Circuit Court, which said Motion is in words and figures following, to-wit:—

In the Circuit Court of the United States for the District of Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Motion to Remand.

Comes now the plaintiff in this action and moves the court here to remand said case back to the District Court of Lancaster County, Ne-

braska, for the reason that this Court has no jurisdiction of the parties or the subject matter as shown on the face of the record. There is no federal question involved in this action.

The validity of the statutes of the United States claimed by the said defendant are uncontroverted and not drawn in question in this action, nor is the validity or authority of the acts done by defendants or claimed to have been done by the plaintiffs in said petition against said defendants, disputed or denied by the defendants.

The allegations in the petition are broad enough in themselves to sustain a judgment without reference to any federal question or the validity of any federal statute.

Wherefore plaintiff prays said action may be remanded at the costs of the defendant.

L. C. BURR,
Att'y for Thomas Bailey.

ELMER D. FRANK, *Clerk.*

Endorsed: Filed Jan. 18, 1894.

Def'ts' ex. "U," P. 1.

1244 Thereupon afterwards towit: At the January 1894 term of said Court, and on the 7th day of February 1894, the following proceedings were had and done, as appear of record on Page 370, Journal "S" of said Court, to-wit:

165, "Q."

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Motion to Remand Overruled.

This cause having been heard on the motion of the plaintiff to remand the same to the District Court, within and for Lancaster County, Nebraska, from whence it came, and the Court being fully advised in the premises, doth now, on this day order and adjudge that said motion be and the same is hereby overruled. To which ruling and order of the court the plaintiff by his attorneys Pound & Burr, then and there duly excepted.

Def'ts Ex. "U," P. 2.

1245 Thereupon afterwards, to-wit: On the 8th day of February 1894 Demurrer of Outcalt and Mosher was filed in said case, which said Demurrer is in words and figures following, to-wit:

In the Circuit Court of the United States, District of Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Demurrer of C. W. Mosher and R. C. Outcalt.

Come now the defendants Richard C. Outcalt and Charles W. Mosher and each for himself separately demurs to the petition of the plaintiff for the following reasons:

1. The facts stated in the petition are not sufficient to constitute a cause of action in favor of the plaintiff and against either of these defendants.
2. Because there is a defect of parties plaintiff in this action.
3. The plaintiff has not legal capacity to sue or to maintain or prosecute this action.

Wherefore each of these defendants ask if they shall be required to farther answer said petition of the plaintiff.

RICHARD C. OUTCALT,
By CHAS. O. WHEDON,
His Attorney.
CHARLES W. MOSHER,
By CHAS. O. WHEDON,
His Attorney.

Endorsed: Filed Feb. 8, 1894. E. D. Frank, Clerk.

Def'ts' Ex. "U," P. 3.

1246 Thereupon afterwards, to-wit: At the January 1894 Term of said Court, and on the 9th day of February 1894, the following proceedings were had and done in said case, as appear of record on page 380 Journal "S" of said Court, to-wit:

165, "Q."

THOMAS BAILEY
v.
CHARLES W. MOSHER ET AL.

Demurrers Sustained and Suit Dismissed.

This cause coming on for hearing on the demurrers of the defendants to the petition of the plaintiff herein filed, was argued and submitted to the court by attorneys for the respective parties, Messrs. Pound & Burr, appearing for the plaintiff and C. O. Whedon and J. W. Deweese for the defendants.

Whereupon after due consideration thereof and being fully advised in the premises, it is now on this day

Ordered and adjudged by the Court that said demurrers be and

the same are hereby sustained, and this cause is dismissed out of this court at the costs of the plaintiff. To which ruling and order of the court said plaintiff, by his attorneys then and there duly excepted. Execution for costs ordered stayed until the further order of this court.

Def'ts' Ex. "U," P. 4.

1247 EXHIBIT "A."

Thereupon afterwards, towit: A Mandate from the Circuit Court of Appeals, was filed in said case, which said Mandate is in words and figures following, to-wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the District Court of Nebraska, Greeting:

[SEAL.]

Whereas, lately in the Circuit Court of the United States for the District of Nebraska, before you, or some of you, in a cause between Thomas Bailey, plaintiff and Charles W. Mosher, Homer J. Walsh, Rolla O. Phillips, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart and Richard C. Outcalt, defendants, wherein the judgment of the said Circuit Court in said case, entered on the 9th day of February A. D. 1894, is in the following words, viz:

"This cause coming on for hearing on the demurrers of the defendants to the petition of the plaintiff herein filed, was argued and submitted to the Court by the attorneys for the respective parties, Messrs. Pound & Burr, appearing for the plaintiff and C. O. Whedon, and J. W. Deweese for the defendants.

Whereupon after due consideration thereof and being fully advised in the premises, it is now on this day ordered and adjudged by the court that said demurrers be and the same are hereby sustained and this cause is dismissed out of this court at the costs of the plaintiff. To which ruling and order of the court said plaintiff by his attorneys then and there duly excepted. Execution for costs ordered stayed until the further order of this court."

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

Def'ts' Ex. "U," P. 5.

1248 And whereas, in the present term of May in the year of our Lord one thousand eight hundred and ninety four the said cause came on to be heard before the said United States Circuit

Court of Appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause, be and the same is hereby affirmed with costs; and that Charles W. Mosher, Homer P. Hamer, Rolla O. Phillips, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart and Richard C. Outcalt recover against Thomas Bailey the sum of twenty dollars for their costs herein and have execution therefore.

SEPTEMBER 10, 1894.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the tenth day of November in the year of our Lord one thousand eight hundred and ninety four.

JOHN J. JORDAN,
Clerk of the United States Circuit
Court of Appeals, Eighth Circuit.

Costs of Defendants in Error.

Clerk	
Printing record	
Attorney	20.00
	$20.00

Paid by pl'ff in error.

Endorsed: Filed Nov. 10, 1894. Elmer D. Frank, Clerk.

Def'ts' Ex. "U," P. 6.

1249 UNITED STATES OF AMERICA, *District of Nebraska, ss:*

I, Geo. H. Thummel, Clerk of the Circuit Court of the United States, District of Nebraska, hereby certify, the foregoing to be a true and correct copy of Motion to Remand, Ruling of the Court thereof, Demurrer, Ruling of the Court thereon, and Judgment, in the case of Thomas Bailey *vs.* Charles W. Mosher *et al.* No. 165 Docket "Q" as the same appears on file and of record in my office.

I further certify that on February 13, 1894, petition for allowance of Writ of Error was filed in said case on behalf of plaintiff and on same date Writ of Error was issued by the Clerk hereof and allowed by the Court, for hearing of said case before the United States Circuit Court of Appeals. That afterwar on November 10th, 1894, Mandate from said U. S. Circuit Court f Appeals was entered for record in said case, a true and correct copy o which Mandate is attached hereto marked exhibit "A" and made a part of this transcript.

Witness my hand, and the seal of said Court at Omaha in said District, this 12th day of June, A. D. 1902.

[Seal U. S. Cir. Court, Dist. Neb.]

GEO. H. THUMMEL, *Clerk.*

Def'ts' Ex. "U," P. 7.

1250 *Transcript.*

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Petition.

In the District Court, Lancaster County, Nebraska.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER, HOMER J. WALSH, ROLLA O. PHILLIPS, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STUART, and RICHARD C. OUTCALT, Defendants.

Petition.

Comes now the plaintiff and for his cause of action herein against the said defendant and each one of them says, that at the special instance and request of the Capital National Bank of Lincoln, Nebraska, on the 11th day of October to the 28th day of December 1892 he loaned to the said Capital National Bank the sum of $11,500 and received from said bank as evidence of said indebtedness its six certain certificates of deposit due and correct copies of said certificates of deposit are hereto attached and made a part of this petition and each one of said certificates of deposit were and are payable on demand and bearing 6% interest from the several dates thereof and said sums of money was loaned and said certificates were issued and delivered to the defendants by said bank upon the following dates to-wit:

October	11,	1892,	one	certificate	for	.....	$500.00
"	"	"	"	"	"	.....	1000.00
"	"	"	"	"	"	.....	8000.00
December	28,	"	"	"	"	.....	500.00
"	"	"	"	"	"	.....	500.00
"	"	"	"	"	"	.....	1000.00

Def'ts' Ex. "U," P. 8.

1251 The plaintiff further says that said Capital National Bank during all the times of the transactions herein set forth doing business in the City of Lincoln, State of Nebraska, was duly organized and incorporated under and by virtue of the banking laws of the

United States and at the time of making said certificates and ever since the above named defendants were the directors and officers of said bank and as said directors and officers had entire and exclusive control and management of the business and affairs of said bank.

And this plaintiff further alleges that the above described certificates of deposit referred are made payable to the order of the plaintiff who has ever since their issue been and now is the owner thereof and the indebtedness represented thereby, and no part of said indebtedness has been paid and there is now due and owing on the same from the Capital National Bank and from each one of said defendants herein the said sum of $11,500.00 together with interest upon the same at the rate of six per cent. per annum from the date of said several certificates of deposit as above set forth.

On the 23rd day of January 1893 the said Capital National Bank closed its doors and ceased to do business and its banking house and assets and all of its property was taken possession of by the comptroller of currency of the United States and since said time one John D. McFarland appointed its receiver and in his place one Kent K. Hayden has been appointed its receiver by the said comptroller and said bank and all of its assets and property and money is now in the hands of and under the control of said Kent K. Hayden, receiver, he is endeavoring to wind up its affairs and said bank is wholly insolvent and unable to pay the indebtedness due to the plaintiff or any part thereof.

Def'ts' Ex. "U," P. 9.

1252 The said defendants and each of them on said 11th day of October 1892 and on the 28th day of December 1892, were and ever since have been directors and officers of said bank and were such officers and directors of said bank for many years prior thereto.

On December 9th, 1892, in compliance with the laws of the United States and upon an order and direction from the comptroller of the currency of the United States the said defendants and Richard C. Outcalt, acting as cashier and the said Charles W. Mosher, C. E. Yates, and R. O. Phillips acting as directors of said bank made what they represented to be a statement of the condition of said bank upon said day and caused the same to be published in the daily newspapers of general circulation of the city of Lincoln as well as the State of Nebraska and which statement is hereto attached and made a part hereof as exhibit "A."

Since and long prior to the making of said loans by the plaintiff the defendants as officers of the said Capital National Bank have regularly made statements as required by law to the comptroller of the currency and caused the same to be published in the newspapers of general circulation in the said city of Lincoln, and the said State of Nebraska, purporting to show the condition of said Bank upon the several dates of said statements. The last statement of said Capital National Bank was one purporting to show the condition of the Capital National Bank on the 9th day of December 1892, a copy of

which is hereto attached and made a part hereof as exhibit "A" and which was published in the daily state journal, of Lincoln, Nebraska, a paper of general circulation in said city and state.

Def'ts' Ex. "U," P. 10.

1253

The plaintiff further alleges that prior to the making of said loans represented by said several certificates of deposit bearing dates aforesaid he saw a statement made out by the said defendants as officers of said bank of date December 28, 1886, a copy of the same is hereby attached and marked exhibit "B" and made a part hereof and the plaintiff saw other statements of a similar kind and character made by the defendants herein prior to the date of making of said loans, or either one of them and he believed said reports and statements were a true and correct statement of the condition of said bank and relying on each and all of said statements loaned the money represented by the certificate of deposit aforesaid, yet this plaintiff alleges the fact to be that the statements of December 28, 1886, as well as the statement marked Exhibit "A" hereto attached as well as all other and each and every statement made and published by the said defendants and every one of them made prior to that 28 day of December 1892 were grossly false and untrue and unreliable. The resources of said bank were mistated, loans and discounts were not truly reported, the amount of stock and security were incorrectly stated. The statement of liability in no way stated the real and true liability of said bank. The Capital stock paid in being represented at $300,000.00 when in fact less than two-thirds of that amount had been paid in. The surplus fund in Exhibit "B" was stated at $12000 and in exhibit "A" at $6,000 and in said other statements at various and different sums of thousands of dollars when in truth and in fact there was no surplus fund. The undivided profits were represented to be in exhibit "B" at $28,439.38 and in exhibit "A" at $21,180.75 and in said other statements at large sums amounting to thousands of dollars when in truth and in fact there were no profits in said concern undivided at the time, or at any other time.

Def'ts' Ex. "U," P. 11.

1254

The amount of demand certificates of deposit outstanding were grossly and hugely incorrectly stated in each and every one of said statements at a much less amount than the true amount outstanding. The notes and bills rediscounted were falsely and incorrectly stated at a much less amount than was in fact outstanding against said bank at the time said statements and each one of them were made every particular item set forth in said statements and each one of them save only as were known by the comptroller of the currency of the United States from the records in his department were falsely and fraudulently and incorrectly mis-tated and misrepresented for the purpose of deceiving and misleading this plaintiff and for the purpose of inducing this plaintiff and others who might be thereby induced to deal with said bank and loan it money upon its demand certificate of deposit whereas if a true and accurate statement of the condition of the said bank at said times had been made

by the officers and directors making said statements and published as required by law and signed by them it would have shown said bank at said time to have been wholly insolvent and unable to meet its obligations and this plaintiff would not have loaned his money to the said bank or permitted said defendants to have obtained the same for said bank.

The plaintiff further alleges that thereafter when the several statements called for — the said comptroller of the currency were made and published they were each and every one entirely unreliable and falsely stated the resources and liability of said bank, when — a true statement made any time after the statement of December 28, 1896, until the closing of said bank by the comptroller it would have appeared to the plaintiff and been evidence that said bank was insolvent.

Def'ts' Ex. "U," P 12.

1255 This plaintiff from the time of seeing the first statement of this bank in 1886, aforesaid and especially prior to the making of his first loan to said bank on October 11, 1892, carefully observed and saw the published statement made by the defendants herein as officers and directors of said bank purporting to show the true condition of said bank at the several dates of their said several reports and relying upon said several reports and statement- and believing that the said defendants would not make a false and incorrect statement and having personal acquaintance with quite a number of said defendants this plaintiff was induced thereby and did loan to said bank the several sums of money represented by the said several demand certificates of deposit bering dates as aforesaid.

Plaintiff alleges that if any one of the several statements made by the defendants had stated the true condition of said bank he would not have parted *with* his money and loaned the same to the said bank. In the several statements made by the defendants herein purporting to show the condition of the said bank during the year 1892, no single item either of resources or liabilities except only such as could be verified in the office of the comptroller of the currency was properly or correctly stated and was falsely and incorrectly stated by the defendants for the purpose of misleading and deceiving the plaintiff and others and inducing him and others to loan or deposit money in said Bank. Under the head of resources except the item of the United States bond- and the redemption fund with the Treasurer of the United States were falsely overstated and enlarged while under the head of liabilities the amount of capital stock paid in surplus funds and undivided profits were all grossly and enor-

Def'ts' Ex. "U," P. 13.

1256 mously overstated while every other item except the item of national bank notes outstanding are falsely and grossly under stated and was so made and done by the defendants to induce this plaintiff and others to loan and deposit his money in said bank and that thereby the defendant- might profit out of the same and had the defendant officers of said bank made and published a true and correct statement showing the real condition of said bank on any of

the several dates for which statements were called by the comptroller and made and published by the defendants herein during the year 1892, said bank would have been shown to have been wholly insolvent and unable to meet its obligations and this plaintiff as well as others would not have loaned said bank any money or deposited any money therein.

The plaintiff herein saw the several statements herein as directors and officers of said bank from the statement of December 28, 1886, until the closing of said bank and relying upon the said statements made by said defendants as officers and directors of said bank was led to believe and did believe that said bank was solvent and in good financial condition and able to pay all of its debts and that his money would be entirely safe and relying upon said statements as to the condition of said bank and believing them true, did loan to said bank the money above set forth and had said officers and directors of said bank in any of their statements made prior to the loaning of his money made a true statement of the condition of said bank this plaintiff would not have loaned said bank his money as aforesaid and that the several statements made of the condition of said bank by the defendants after the part of said money

Def'ts' Ex. "U," P. 14.

had been loaned to the bank by the plaintiff had stated the true condition of said

1257 bank then this plaintiff would have made demand immediately for his money from said bank for the whole thereof, but relying upon the statements made by the defendants herein as officers and directors of said bank and believing them to be true he was induced to and did allow his money to remain in said bank until closed by the comptroller of the currency as aforesaid.

Plaintiff further represents that the several statements made by the defendants as aforesaid were made with the full knowledge and consent of each of the several defendants herein and each of said defendants had actual knowledge of the falsity and misstatement and uncorrect statement of the several statements made and published and referred to in this petition and if the said several defendants herein as officers and directors of said bank did not have actual knowledge of the falsity and incorrect and misleading parts of said reports then they and each of them were grossly negligent and careless of their duty in the management of the affairs of said corporation and they should and ought to have known of such deceit and falsity and incorrectness made therein and an examination into the affairs of and into the books and accounts of said bank at any of the several times herein referred to would have disclosed to the defendant- herein that their published reports were wholly false and untrue and that its resources at the several times named in the statements were not such as were stated in their different

Def'ts' Ex. "U," P. 15.

reports and would have disclosed to the defendants as officers and directors of said bank as well as to the plaintiff and others that the affairs of the bank were being mismanaged and its moneys and assets

1258 misappropriated and squandered and the defendants herein as officers and directors of said bank in failing to exercise the

slightest diligence to make the slightest investigation of the business of said corporation were grossly and wickedly negligent of their duties as such officers and directors and as the plaintiff for a great many years prior to the loan of his money as hereinbefore set forth had been well acquainted with and knew the business reputation and financial standing of each one of the defendants herein and had known them to be men who in the conduct of their own personal affairs were careful, watchful and prudent business men he was thereby led and induced to place confidence in their reports of the condition of said bank and he believed that the affiars of said bank under their care and control would be carried on and conducted in a safe and business like manner and that the several stat-ments made to the comptroller of the currency and published as required by law and verified by the several defendants could be relied upon as accurate and correct and so believing and so relying upon said reports and being deceived thereby he loaned the same to the said bank and by reason of the failure of the said several defendants, directors and officers of said bank to perform the duties required as such officers and by reason of the false stat-ments made by the defendants as aforesaid and by reason of mismanagement of the affairs of said bank, officers and directors of said bank insolvent this plain-plaintiff has suffered damages to the amount of $11,500 and interest thereon as aforesaid.

Under the banking law by which the Capital National bank was organized and carrying on business the total liabilities of any assignee, or any persons, or any company of corporations or firm for money borrowed including in the liabilities of a company or firm or the liabilities of the several members shall at no time exceed one tenth part of the capital stock of such as-ignee actually paid in and notwithstanding this provision of the law and in violation thereof, these defendants as directors and officers of said Capital Bank loaned to many persons more than the amount limited by law and especially loaned to one Ed. W. Mosher a brother of one of the defendants herein the sum of upwards of $109,000 the said sum is now due and owing from said Ed. W. Mosher to the receiver of the said Capital National Bank and said sums of money was loaned to said Ed. W. Mosher by the defendants herein as officers of said bank prior to the closing of said bank as aforesaid.

Def'ts' Ex. "U," P. 17.

1259

The defendants herein further in violation of law loaned to Charles W. Mosher $78,000 and upwards, the said C. W. Mosher being one of the defendants herein and president of the said Capital National Bank and claiming to act and did act as one of its directors and the said $78000 was loaned to the said Chas. W. Mosher by the defendants herein as officers and directors of the said Capital National Bank, which amount is now due and owing from said Charles W. Mosher to the receiver of said bank. The defendants herein as officers and directors of said bank prior to the closing of said bank loaned to Richard C. Outcalt one of the defendants herein and cashier of said bank $53,000 and upwards in violation of law

which sum is wholly due and owing from said R. C. Outcalt to the receiver of said Capital National Bank and the above sums of money *was* loaned to Ed. W. Mosher, Charles W. Mosher and Richard C. Outcalt, were wrongfully allowed to be taken out of said bank and disappeared and wholly lost through the negligence and carelessness of the several defendants herein and done with intent to deceive plaintiff and others and the said Richard C. Outcalt was the acting cashier of said bank.

Def'ts' Ex. "U," P. 17.

1260 By the law under which the Capital National Bank was organized it was not allowed to make or pay any dividends or any profits on hands to defendants or stockholders under ten per cent. of the capital stock, yet notwithstanding the law the defendants herein as officers and directors of said bank regularly declared dividends and to the stockholders of said bank the same thereby reducing the capital stock of said bank when in truth and in fact at no time mentioned in this petition had there been any profits nor was there any to be made by said bank and all dividends declared and money paid out by said bank for the same was in violation of law and by these several defendants as directors and officers of said bank the same was declared and paid out in violation of and contrary to the law under which said bank was organized and contrary to the duty of the said defendants and by reason of the several violations of the banking law as above set forth by these several defendants they have become and are liable to this plaintiff for the damages he has sustained by reason of their said acts in the sum of $11,500 together with interest thereon from the 11th day of October to the 28th day of December 1892 at the rate of seven per cent. per annum.

Wherefore plaintiff prays judgment against the several defendants herein and each of them in the sum of $11,500 together with interest on $9,500 from the 11th day of October 1892, and on the sum of $2,000 from December 28th, 1892 at the rate of seven per cent. per annum and costs of this action.

THOMAS BAILEY,
NORVAL BROS., &
LOWLEY & POUND &
BURR,
His Attorneys.

Def'ts' Ex. "U," P. 18.

1261 STATE OF NEBRASKA, *Seward County, ss:*

Thomas Bailey being first duly sworn on his oath says that he is the plaintiff in the above entitled action; that he has read the foregoing petition, knows the contents thereof and believes the facts therein stated to be true.

THOMAS BAILEY.

Subscribed in my presence and sworn to before me this 17th day of October 1893.

GEO. W. LOWLEY,
Notary Public.

[SEAL.]

Precipe.

To the Clerk of the District Court.

DEAR SIR: Please issue summons in the above entitled action and deliver the same to the sheriff of Lancaster County for service, endorse on the same that the plaintiff will take judgment for $11,500 together with interest on $9,500 from October 11, 1892 and on $2,000 from December 28, 1892 at the rate of seven per cent. per annum and costs of the action, make the same returnable according to law and oblige.

Copy.

$500. No. 3.

Capital National Bank.

LINCOLN, NEBR., *Oct.* 11, 1892.

Thomas Bailey has deposited in this bank five hundred Dollars payable to the order of self on return of this certificate properly endorsed.

No. 28158. Not subject to check.

O. F. FUNK, *For Cash.*

On margin: Interest at 3–5 or 6% if left 3–6 or 12 months. No interest after maturity.

Copy.

$500. No. 3.

Capital National Bank.

LINCOLN, NEB., *Dec.* 28, 1892.

Thomas Bailey has deposited in this bank five hundred dol-
1262 lars payable to the order of himself on return of this Certificate properly endorsed.

No. 28371. Not subject to check.

R. C. OUTCALT, *Cash.*

Def'ts' Ex. "U," P. 19.

On margin: Interest at 3–5 or 6 if left 3–6 or 12 months. No interest after maturity.

Copy.

$1000. No. 3.

Capital National Bank.

LINCOLN, NEB., *Dec.* 28*th*, 1892.

Thomas Bailey has deposited in this bank one thousand dollars, payable to the order of self on return of this certificate properly endorsed.

No. 28373. Not subject to check.

R. C. OUTCALT, *Cash.*

On margin: Interest at 3–5 or 6 if left 3–6 or 12 months. No interest after maturity.

Copy.

$1000. No. 3.

Capital National Bank.

LINCOLN, NEB., *Oct.* 11, 1892.

Thomas Bailey has deposited in this bank one thousand Dollars payable to the order of self on return of this certificate properly endorsed.

No. 28157. Not subject to check.

O. F. FUNK, *For Cash.*

On margin: Interest at 3–5 or 6% if left 3–6 or 12 months. No interest after maturity.

Copy.

$8000. No. 4.

Capital National Bank.

LINCOLN, NEB., *Oct.* 11, 1892.

Thomas Bailey has deposited in this bank eight thousand dollars payable to the order of self on return of this certificate properly endorsed.

No. 28156. Not subject to check.

O. F. FUNK, *For Cash.*

On margin: Interest at 3–5 or 6% if left 3–6 or 12 months. No interest after maturity.

Copy.

$500. No. 3.

Capital National Bank.

LINCOLN, NEB., *Dec.* 28, 1892.

Thomas Bailey has deposited in this bank five hundred dollars payable to the order of self on return of this certificate properly endorsed.

No. 28372. Not subject to check.

R. C. OUTCALT, *Cash.*

On margin: Interest at 3–5 or 6% if left 3–6 or 12 months
1263 No interest after maturity.

Def'ts' Ex. "U," P. 20.

1264 EXHIBIT "A."

Report of the Condition of the Capital National Bank, December 9, 1892.

Resources.

Loans and discounts	$768,601.44
Overdrafts secured and unsecured	6,217.74
U. S. Bonds to secure circulation	50,000.00

Stocks, securities etc		325.00
Due from approved reserve agents		107,090.01
Due from other national banks		17,800.33
Due from state banks and bankers		5,394.72
Banking house furniture and fixtures		5,770.00
Real estate and mortgages owned		38,617.92
Current expenses and taxes paid		14,286.28
Checks and other items		3,698.56
Exchanges for clearing house		8,841.16
Bills of other banks		2,355.00
Fractional paper currency, nickels and cents		298.71
Specie		26,789.50
Legal tender notes		17,431.00
Redemption fund with U. S. Treasurer (5% of circulation)		1,350.00
Total		$1,074,867.37

Liabilities.

Capital stock paid in		$300,000.00
Surplus fund		6,000.00
Undivided profits		21,180.75
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$356,139.33	
Demand certificates of deposit	158,545.88	
Due to other national banks	81,574.14	
Due to state banks and bankers	47,372.89	
		643,732.24
Notes and bills rediscounted		59,054.38
		$1,074,867.38

STATE OF NEBRASKA, *Lancaster County, ss:*

I, R. C. Outcalt, cashier of the above named bank do solemnly swear that the above stat-ment is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed in my presence and sworn to before me this 15th day of December, 1892.

HAL C. YOUNG,
Notary Public.

Correct
C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,
Directors.

Def'ts' Ex. "U," P. 21.

1265 EXHIBIT "B."

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, December 28, 1886.

Resources.

Loans and discounts		$737,426.12
Overdrafts		3,974.33
U. S. Bonds to secure circulation		50,000.00
Other stocks, bonds and mortgages		22,739.34
Due from approved and reserve agents		74,068.63
Due from other National Banks		56,215.29
Due from state banks and bankers		10,495.36
Real estate, furniture and fixtures		7,177.33
Current expenses and taxes paid		8,885.43
Premiums paid		7,188.43
Checks and other cash items		13,742.02
Bills of other banks		3,712.00
Fractional paper currency, nickels and cents		216.42
Specie		27,308.00
Legal tender notes		10,400.00
Redemption with U. S. Treasurer (5% of circulation)		1,900.00
Total		$1,035,488.92

Liabilities.

Capital stock paid in		$300,000.00
Surplus fund		12,000.00
Undivided profits		28,439.38
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$414,962.35	
Demand certificates of deposit	40,859.66	
Due to other National Banks	107,648.27	
Due to state banks and bankers	34,448.66	
		597,918.94
Notes and Bills rediscounted		52,090.60
Total		$1,035,448.92

STATE OF NEBRASKA, *Lancaster County, ss:*

I, C. W. Mosher president of the above bank do solemnly swear that the above is true to the best of my knowledge and belief.

C. W. MOSHER, *President.*

Subscribed in my presence and sworn to before me this 11th day of October 1886.

[SEAL.] E. R. SMITH, *N. P.*

Correct.

Attest:

C. W. MOSHER,
C. E. YATES,
D. E. THOMPSON,
Directors.

Def'ts' Ex. "U." P. 22

1266 Endorsed: In the District Court, Lancaster County Nebr.—Thomas Bailey,—*vs.* Charles W. Mosher *et al.*,—Petition—Clerk's office, District Court. Filed Oct. 27, 1893. E. Baker, Clerk Dist. Court.

Summons.

STATE OF NEBRASKA, *Lancaster County, ss:*

The State of Nebraska to the Sheriff of said County, Greeting:

You are hereby commanded to notify Charles W. Mosher, Homer J. Walsh, Rollo O. Phillips, Charles E. Yates, Ellis P. Hamer Ambrose P. S. Stuart and Richard C. Outcalt, Defendants that they have been sued by Thomas Bailey, plaintiff in the District Court of the third judicial district in and for said County of Lancaster, and that unless they answer by the 27th day of November A. D. 1893, the petition of the said Thomas Bailey, plaintiff filed against them in the Clerk's office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on or before the 6th day of November, A. D. 1893.

Witness my hand and seal of said court, at Lincoln, this 27th day of October A. D. 1893.

E. BAKER, *Clerk.*
[SEAL.] By J. D. HARRIS, *Deputy.*

Endorsed: Summons—District Court. Lancaster County.

9-92 Doc. 9 Page 92.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

If defendant fail to appear and answer the plaintiff will take judgment for $11,500.00 together with 7 per cent. interest on $9500 from October 11th, 1892 and $2000.00 with 7 per cent. from Dec. 28th, 1892 and costs of suit.

Attest:— E. BAKER, *Clerk,*
By J. D. HARRIS, *Deputy.*

Def'ts' Ex. "U," P. 23.

1267 Returnable Nov. 6th, 1893.

Received Oct. 28, 1893.

POUND & BURR,
Plaintiff's Attorneys.
SAM McCLAY, *Sheriff.*

THE STATE OF NEBRASKA, *Lancaster County, ss:*

I hereby certify that on the 2nd day of November 1893 I served the within writ of summons on the within named Charles W. Mosher, Homer J. Walsh, Rollo O. Phillips, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart and Richard C. Outcalt, by delivering to each of them a true and certified copy hereof, with all endorsements thereon, as required by law.

SAM McCLAY, *Sheriff,*
By LOUIS OTTO, *Deputy.*

Fees.

Service and return	$2.00
Copy	1.75
Mileage	.30
	$4.05

Clerk's office, District Court:—Filed Nov. 6, 1893.

E. BAKER,
Clerk Dist. Court.

Petition for Removal to Federal Court.

In the District Court of Lancaster County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER, HOMER J. WALSH, ROLLA O. PHILLIPS, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STUART, and RICHARD C. OUTCALT.

Petition for Removal to Federal Court.

Your petitioners, the defendants named in the above entitled cause, show to this Honorable Court, that the matter and amount in dispute in the above entitled suit exceeds exclusive of interest and costs, the sum of two thousand dollars. ($2000.00)

That the plaintiff has filed a petition in said Court showing that he was an individual depositor in the Capital National Bank of Lincoln, Nebraska, and alleging that your petitioners were directors of said banks that said bank was a corporation organized as a national banking association under and by virtue of the national banking laws of the United States and that your petitioners in making reports of the resources and liabilities of said bank to the Comptroller of the Currency, and in publishing the same in the local newspapers as required by the provisions of said banking law, failed to set forth the true condition of said bank and by such reports showed the resources of the bank to be much larger than they were in fact and the liabilities much less than they were in fact, and that these reports were either falsely and fraudulently made designedly and willfully by your petitioner or that they ignorantly and negligently allowed the same to be issued, deceiving the plaintiff into depositing his money in said bank to his damage.

Def'ts' Ex. "U," P. 24.

1268

Your petitioners aver that a controversy arises in said suit between the plaintiff and your petitioners as defendants, under the law of the United States known as the National Banking Act; that the plaintiff's alleged cause of action rests upon the requirements of the laws of the United States and said plaintiff claims and will claim in the prosecution of his suit; that he was an individual depositor and creditor has the right to sue and recover damages from your petitioners as directors of said National Banking Association, without any forfeiture of the charter of said bank, and without the suit being authorized either by the comptroller of the currency or the receiver of the bank, which receiver has been appointed

Def'ts' Ex. "U," P. 25.

by the Comptroller of the Currency, and the said bank is now in the charge and control and was under such charge and control
1269 and management at the time of the commencement of this action; whereas your petitioners the defendants in said cause of action, claim that by a proper construction of the national banking act and the duties of your petitioners as directors under the laws of the United States they are not personally liable to the plaintiff as a depositor and creditor in the action which he has brought, or otherwise, and the said action being one arising under the laws of the United States, said Court has no jurisdiction to entertain alleged cause of action set up in plaintiff's petition.

That in determining the controversy between the plaintiff and these petitioners as defendants, there necessarily arises a federal question to be determined by the Court.

Your petitioners therefore claim that this action ought to be removed from this said court to the Federal Court and your petitioners herewith offer a good and sufficient bond with surety for their entering in the Circuit Court of the United States for the District of Nebraska, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court of the United States if said Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioners therefore pray this Honorable Court to proceed no further therein, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the District of Nebraska, and to this end your petitioners will ever pray.

Def'ts' Ex. "U," P. 26.

By MARQUETT, DEWEESE & HALL,
1270 *Att'ys for Homer J. Walsh, Rolla O. Phillips, Chas. E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Chas. W. Mosher, Richard C. Outcalt.*
By CHAS. O. WHEDON, *Their Att'ys.*

Endorsed: In the District Court, Lancaster County, Nebr. Thomas Bailey *vs.* Charles W. Mosher, *et al.* Petition for removal. Clerk's office, District Court. Filed Nov. 27, 1893. E. Baker, Clerk Dist. Court.

Bond for Removal.

In the District Court of Lancaster County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER, HOMER J. WALSH, ROLLA O. PHILLIPS, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STUART, and RICHARD C. OUTCALT.

Undertaking.

Know all men by these presents, That, we Homer J. Walsh, Rolla O. Phillips, Charles E. Yates, Ellis P. Hamer, and Ambrose P. S. Stuart, as principals and A. B. Minor as surety, are held and firmly bound unto Thomas Bailey in the penal sum of three hundred

Dollars, lawful money of the United States for the payment of which well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

The condition of this obligation is such, that if the said Homer J. Walsh, Rolla O. Phillips, Charles E. Yates, Ellis P. Hamer, and Ambrose P. S. Stuart, shall enter and file or cause to be entered and filed in the Circuit Court of the United States in and for the District of Nebraska, on the first day of its next session, copies of all proceed-s, pleadings, depositions, testimony and other pleadings in a certain suit or action now pending in the District Court of the County of Lancaster and state of Nebraska, in which Thomas Bailey is plaintiff, and Charles W. Mosher, Homer J. Walsh Rolla O. Phillips, Charles E. Yates Ellis P. Hamer, Ambrose P. S. Stuart, David E. Thompson, and Richard C. Outcalt are defendants and shall do such other appropriate acts as by the Acts of Congress in that behalf are required to be done upon the removal of such suits from said state court into the United States Court, then this obligation to be void, otherwise of force.

Def'ts' Ex. "U," P. 27.

1271

R. D. PHILLIPS.
H. J. WALSH.
C. E. YATES.
A. P. S. STUART.
E. P. HAMER.
A. B. MINOR.

STATE OF NEBRASKA *Lancaster County, ss:*

I, A. B. Minor of said County the surety named in the foregoing bond, being duly sworn do depose and say that I am a resident of the State of Nebraska, and a property holder therein; that I am worth the sum of three hundred dollars over and above all my debts and liabilities and exclusive of property exempt from execution; that I have property in the State of Nebraska, liable to execution for the value of more than three hundred dollars.

A. B. MINOR.

Sworn to before me and subscribed in my presence by A. B. Minor this 18th day of November A. D. 1893.

J. A. KILROY,
Notary Public.

[SEAL.]

My commission as Notary Public will expire the — day of May 1894.

Endorsed: In District Court, Lancaster County, Nebr. Thomas Bailey *vs.* Chas. W. Mosher, *et al.* B-ank for Removal Clerk's office District Court, Filed Nov. 27, 1893. E. Baker, Clerk Dist. Court.

Def'ts' Ex. "U," P. 28.

1272 *Demurrer.*

In the District Court of Lancaster County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER, HOMER J. WALSH, ROLLA O. PHILLIPS, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STUART, and RICHARD C. OUTCALT.

Demurrer.

Now comes the defendants Homer J. Walsh, Rolla O. Phillips Charles E. Yates, Ellis P. Hamer, and Ambrose P. S. Stuart, and appearing for themselves demur to the petition filed by the plaintiff in the above entitled cause, for the following reasons.

1st. The Court has no jurisdiction of the subject of the action set forth in the petition.

2nd. The plaintiff has no legal capacity to sue and maintain the alleged cause of action against these defendants.

3rd. There is a defect of parties plaintiff.

4th. The petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against these defendants.

MARQUETTE, DEWEESE & HALL,
Att'ys for Defendants Named Herein.

Endorsed: In the District Court Lancaster County, Neb. Thomas Bailey *vs.* Charles W. Mosher, *et al.*, Demurrer, Clerk's Office District Court Filed Nov. 27, 1893 E. Baker, Clerk Dist. Court.

Certificate.

STATE OF NEBRASKA, *Lancaster County, ss:*

I, E. Baker, Clerk of the District Court
Def'ts Ex. "U," P. 29. Third Judicial District of Nebraska, in and for said County, do hereby certify that the above and foregoing is a true and correct copy of all the papers filed with all the endorsements on each, together with
1273 all proceedings and final judgment of our said Court, in a cause therein, wherein Thomas Bailey is plaintiff and Charles W. Mosher, *et al.* are defendants as the same appears fully upon the records and files of said Court, and now in my charge remaining as Clerk aforesaid.

In testimony whereof I have hereunto set my hand officially and attached the seal of said Court at Lincoln, this 23rd day of December A. D. 1893. E. BAKER, *Clerk, D. C.*,
[SEAL.] By J. D. HARRIS, *Deputy.*

Trans. $6.75.

Pleas.

In the District Court of the Third Judicial District of Nebraska, in and for the County of Lancaster.

At the September A. D. 1893 term of said Court, begun and held in the City of Lincoln, in said County and State, on the 25th day

of September, in the year of our Lord one Thousand Eight hundred and ninety three, and on a day therein to-wit: On the 30th day of December A. D. 1893 (that being the 82nd Judicial day of said September A. D. 1893 term of said Court. Present Honorable Jesse B. Strode, Judge Presiding Sam McClay, Sheriff and E. Baker, Clerk, the following proceedings among others were had and done, to-wit:

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

This cause now comes on to be heard upon the application of the defendants for the removal of this cause to the Circuit Court of the United States, in and for the District of Nebraska, and the said defendants having offered a bond herein for
Def'ts' Ex. "U," P. 30. the removal of said cause pursuant to statute, it is by the Court ordered that the bond of the said defendants as to form and sufficiency be and the same hereby is approved, and that the question of removal of this cause be, and the same hereby is removed for future
1274–1296 determination.

Certificate.

THE STATE OF NEBRASKA, *Lancaster County, ss:*

I, E. Baker, Clerk of the District Court, Third Judicial District of Nebraska, in and for said County do hereby certify that the above and foregoing as a true and correct copy of the Order, made by said Court, on the 30th day of December A. D. 1893 in a cause therein, wherein Thomas Bailey is plaintiff, and Charles W. Mosher *et al.* are defendants, as the same appears upon Court Journal "8" at page 249 of the record of said Court and now in my charge remaining as Clerk aforesaid.

In testimony whereof I have hereunto set my hand officially and attached the seal of said Court at Lincoln, this 6th day of January A. D. 1894.

E. BAKER, *Clerk,*
[SEAL.] By J. D. HARRIS, *Deputy.*

Filed Jan. 8, 1894.
ELMER D. FRANK, *Clerk.*

UNITED STATES OF AMERICA, *District of Nebraska, ss:*

I, George H. Thummel, Clerk of the Circuit Court of the United States for the District *Court* of Nebraska do hereby certify the foregoing to be Original Transcript in the case of Thomas Bailey *vs.* Charles W. Mosher, *et al.* No. 165 Q. as the same appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and the Seal of said Court at Omaha, in said District this 12th day of June A. D. 1902.

[U. S. Cir. Court Seal.]

GEO. H. THUMMEL, *Clerk.*

Def'ts' Ex. "U," P. 31.

* * * * * * *

1297 Mr. THOMAS: The plaintiffs offer in evidence exhibit No. 1074.

FOLD OUTS 276 - 290

ARE TOO LARGE TO BE FILMED

1312–1322 The opinion in the case of Thomas Bailey *vs.* Mosher *et al.* is offered in evidence, as found in Vol. 63 of the Federal Reporter commencing at page 488 and ending at the bottom of page 491.

* * * * * * *

1323 & 1324 In the District Court of Seward County, State of Nebraska.

THE STATE OF NEBRASKA, *Lancaster County, ss:*

JONES NATIONAL BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendant-.

Depositions.

Depositions of sundry witnesses taken before me, a Notary Public, duly commissioned and qualified for and residing in the County of Lancaster and State of Nebraska on the 7th and 8th day- of April, in the year 1902, between the hours of 9 A. M. and 6 P. M., at the office of Ricketts & Ricketts, #414 Richards Block, in the city of Lincoln, in said County, pursuant to the annexed notice, to be read in evidence on behalf of the plaintiff in an action pending in the District Court of Seward County, in which Jones National Bank is Plaintiff, and Charles W. Mosher, *et al.* are Defendants. John W. McDonald, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposes and says as follows, viz:

Appearances.

For plaintiff, R. S. Norval and J. J. Thomas.
For defendants, J. W. Deweese, and C. O. Whedon.

Witness examined by Mr. THOMAS:

* * * * * * *

1325–1359 1 Q. You may state your name?
A. John W. McDonald.
2 Q. You are Receiver for the Capital National Bank of Lincoln, Nebraska?
A. Yes sir.

* * * * * * *

1360 April 8, 1902, 2 o'clock P. M.—Direct examination of witness McDonald continued. Examined by Mr. THOMAS:

197 Q. I hand you original certificate Number 21379 of the Capital National Bank, and Exhibit "A," and ask you to state whether or not Exhibit "A" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?
A. Yes, I think it is, so far as I can see.

198 Q. Neither the original nor the copy bear any endorsements?
A. No.

1361 We now offer in evidence Exhibit "A," being a photographic reproduction of certificate Number 21379 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.
(Exhibit "A" is as follows:—)

EXHIBIT "A." (Lo. Ricketts, N. P.)

$50,000.00.

Capital National Bank.

LINCOLN, NEB., *Dec.* 23, 1889.

J. E. Hill Treas. has deposited in this Bank Fifty Thousand Dollars payable to the order of self on return of this Certificate properly endorsed.
No. 21379 Not subject to check.

C. W. MOSHER, *Pt.*

Interest at —— if left —— months.
No interest after maturity.
Paid Jan. — 1898 Capital Nat'l Bank Lincoln Neb.

199 Q. I hand you original certificate of deposit Number 23593, of the Capital National Bank, and Exhibit "B," and ask you to state whether or not Exhibit "B" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?
A. Yes I think it is, so far as I can see.
200 Q. Do the original and copy bear any endorsements?
A. Yes.

1362 We now offer in evidence Exhibit "B," being a photographic reproduction of certificate Number 23593 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

Exhibit "B" is as follows:—

EXHIBIT "B." Lo. Ricketts, N. P.

$40,000.00.

Capital National Bank.

LINCOLN, NEB., *Dec. 9th*, 1890.

J. E. Hill State Treasurer has deposited in this Bank Forty Thousand Dollars payable to the order of himself on return of this Certificate properly endorsed.

No. 23593 Not subject to check.

C. W. MOSHER, *P't.*

C. W. MOSHER, *P't.*
J. E. HILL, *Treasurer.*

Paid Nov. 3, 1892 Capital Nat'l Bank Lincoln, Neb.

201 Q. I hand you original certificate Number 24452 of the Capital National Bank, and Exhibit "C," and ask you to state whether or not Exhibit "C" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?

A. Yes I think it is, so far as I can see.

202 Q. Do the original and copy bear any endorsements?

A. Yes.

1363 We now offer in evidence Exhibit "C," being a photographic reproduction of certificate Number 24452 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make at a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

Exhibit "C" is as follows:—

EXHIBIT "C." Lo. Ricketts, N. P.

$100250.00.

Capital National Bank.

LINCOLN, NEB., *Apr.* 24, 1891.

J. E. Hill Treas. has deposited in this Bank One Hundred Thousand & two hundred & fifty Dollars payable to the order of self on return of this Certificate properly endorsed.

No. 24452 Not subject to check.

C. W. MOSHER, *P't.*

Interest at —— if left —— months.
No interest after maturity.

J. E. HILL, *Treas.*,
By C. W. MOSHER,
Treas. of Nebr. Relief Fund.

Paid Capital Nat'l Bank Lincoln, Nebr.

203 Q. I hand you original certificate Number 24937 of the Capital National Bank, and Exhibit "D," and ask you to state whether or not Exhibit "D" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?

1364 A. Yes, I think it is, so far as I can see.

204 Q. Neither the original nor the copy bear any endorsements?

A. No.

We now offer in evidence Exhibit "D," being a photographic reproduction of certificate Number 24937 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

Exhibit "D" is as follows:—

EXHIBIT "D." Lo. Ricketts, N. P.

#11445.

Otoe Co. Coupons.

$14650.00.

Capital National Bank.

LINCOLN, NEB., *July* 18, 1891.

J. E. Hill Treas. has deposited in this Bank Fourteen thousand six hundred fifty & no/100 Dollars payable to the order of self on return of this Certificate properly endorsed.

No. 24937 Not subject to check.

—— ——.

Interest at —— if left —— months.

No interest after maturity.

Paid Capital Nat'l Bank Lincoln, Neb.

205 Q. I hand you original certificate Number 24941 of the Capital National Bank, and Exhibit "E," and ask you to state whether or not Exhibit "E" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?

1365 A. Yes, I think it is, so far as I can see.

206 Q. Neither the original nor the copy bear any endorsements?

A. No.

We now offer in evidence Exhibit "E," being a photographic reproduction of certificate Number 24941 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

Exhibit "E" is as follows:—

EXHIBIT "E." Lo. Ricketts, N. P.

Lancaster Co. Coupons.

$10000.00.

Capital National Bank.

LINCOLN, NEB., *July* 20, 1891.

J. E. Hill St. Treas. has deposited in this Bank Ten Thousand & no/100 Dollars payable to the order of self on return of this Certificate properly endorsed.
No. 24941 Not subject to check.

O. FUNKE, *For C.*

Interest at —— if left —— months.
No interest after maturity.
Paid Capital Nat'l Bank Lincoln, Neb.

1366 207 Q. I hand you original certificate Number 25097 of the Capital National Bank, and Exhibit "F," and ask you to state whether or not Exhibit "F" is a true and correct photographic reproduction of the original certificate together with all endorsements thereon?
A. Yes, I think it is, so far as I can see.
208 Q. Neither the original nor the copy bear any endorsements?
A. No.

We now offer in evidence Exhibit "F," being a photographic reproduction of certificate Number 25097 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.
Exhibit "F" is as follows:—

EXHIBIT "F." Lo. Ricketts, N. P.

$50,000.00.

Capital National Bank.

LINCOLN, NEB., *Aug.* 17, 1891.

J. E. Hill Treas. has deposited in this Bank Fifty Thousand Dollars payable to the order of self on return of this Certificate properly endorsed.
No. 25097 Not subject to check.

C. W. MOSHER, *P't.*

Interest at —— if left —— months.
No interest after maturity.
Paid Jan. 6, 1893 Capital Nat'l Bank Lincoln, Neb.

1367 209 Q. I hand you original certificate Number 25047 of the Capital National Bank, and Exhibit "G," and ask you

to state whether or not Exhibit "G" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?

A. Yes, I think it is, so far as I can see.

210 Q. Do the original and copy bear any endorsements?

A. Yes.

We now offer in evidence Exhibit "G," being a photographic reproduction of certificate Number 25047 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

Exhibit "G" is as follows:—

EXHIBIT "G." Lo. Ricketts, N. P.

$37,975.00.

Capital National Bank.

LINCOLN, NEB., *Aug.* 5, 1891.

J. E. Hill Treas. has deposited in this Bank Thirty Seven Thousand nine hundred & seventy five Dollars payable to the order of self on return of this Certificate properly endorsed.

No. 25047 Not subject to check.

C. W. MOSHER, *Pt.*

Interest at Apr. coupons if left —— months.
No interest after maturity.

C. W. MOSHER, *Pr't.*

Or order for collection.
Account of Treasurer of State of Nebraska.

J. E. HILL, *Treasurer.*
G. M. BARTLETT.

Paid Capital Nat'l Bank Lincoln, Neb.

1368 211 Q. I hand you original Certificate Number 25636 of the Capital National Bank, and Exhibit "H," and ask you to state whether or not Exhibit "H" is a true and correct photographic reproduction of the original certificate together with all endorsements thereon?

Objected to as incompetent and not the best evidence.

A. Yes, I think it is, so far as I can see.

212 Q. Do the original and copy bear any endorsements?

A. Yes.

We now offer in evidence Exhibit "H," being a photographic reproduction of certificate Number 25636 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of

the witness John E. Hill, whose testimony is taken at the same time.

Exhibit "H" is as follows:—

EXHIBIT "H." Lo. Ricketts, N. P.

$50,000.00

Capital National Bank.

LINCOLN, NEB., *Nov.* 18, 1891.

J. E. Hill Treas. has deposited in this Bank Fifty Thousand Dollars payable to the order of self on return of this Certificate properly endorsed.

No. 25636 Not subject to check.

C. W. MOSHER, *P't.*

Interest at —— if left —— months.

No interest after maturity.

J. E. HILL, *Treas.*

Paid May 21, 1892 Capital National Bank Lincoln, Nebraska.
Paid May 21, 1892 Capital Nat'l Bank Lincoln, Nebr.

1369 213 Q. I hand you certificate Number 25862 of the Capital National, and Exhibit "I," and ask you to state whether or not Exhibit "I" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?

Objected to as incompetent and not the best evidence.

A. Yes, I think it is, so far as I can see.

214 Q. Do the original and the copy bear any endorsements?

A. Yes.

We now offer in evidence Exhibit "I," being a photographic reproduction of certificate Number 25862 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

Exhibit "I" is as follows:—

EXHIBIT "I." Lo. Ricketts, N. P.

$37114.75.

Capital National Bank.

LINCOLN, NEB., *Dec.* 22, 1891.

J. E. Hill, Treas. has deposited in this Bank Thirty seven thousand one hundred fourteen & 75/100 Dollars payable to the order of self on return of this Certificate properly endorsed.

No. 25862 Not subject to check.

C. W. MOSHER, *P't.*

Interest at —— if left —— months.

No interest after maturity.

Pay C. W. Mosher Pr't Or order for collection, Account of Treasurer of State of Nebraska.

J. E. HILL, *Treasurer.*
BARTLETT.

Paid 1898 Capital Nat'l Bank Lincoln Nebr.

1370–1373 215 Q. I hand you original certificate Number 25861 of the Capital National Bank, and Exhibit "J," and ask you to state whether or not Exhibit "J" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?

A. Yes, I think it is, so far as I can see.

216 Q. Neither the original nor the copy bear any endorsements?

A. No.

We now offer in evidence Exhibit "J," being a photographic reproduction of certificate Number 25861 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the *of the* deposition of the witness John E. Hill, whose testimony is taken at the same time.

Exhibit "J" is as follows:—

EXHIBIT "J." Lo. Ricketts, N. P.

$38114.75.

Capital National Bank.

LINCOLN, NEB., *Dec.* 22, 1891.

J. E. Hill Treasurer has deposited in this Bank Thirty Eight Thousand one hundred & fourteen 75/100 Dollars payable to the order of self on return of this Certificate properly endorsed.

No. 25861 Not subject to check.

C. W. MOSHER, *P't.*

Interest at —— if left —— months.
No interest after maturity.
Paid Dec. 22, 1891 Capital Nat'l Bank Lincoln Nebr.

* * * * * * *

1374 Redirect examination by Mr. THOMAS:

231 Q. Will you make examination of the books, records, and documents of the Capital National Bank, and qualify yourself, so that you will be able to identify them as the books of the Capital National Bank, in event your deposition is taken within one or two weeks from this date?

A. Well, I would not like to answer that question. I don't know.

232 Q. Within what time do you think you could qualify yourself to testify to the contents of the books, or as to the identity of the books and documents, as being the books, documents, and papers of the Capital National Bank, of which you are receiver,

referring to the books, papers, and documents now in your possession as receiver of the Capital National Bank?

A. Well, that question I would not like to answer. I do not know how long it would take me. I don not know positively whether I could qualify, and I do not know how much time I would be justified in giving to it. It is a question that I am really not competent to answer.

232 Q. Will you make an effort to qualify yourself with reference to the matters hereinbefore referred to?

1375 A. I am not a lawyer, and I do not know what would be necessary to do to qualify.

234 Q. You are an accountant and bookkeeper, are you not?

A. I am hardly a bookkeeper. I have had more or less to do with them.

235 Q. You have had experience in examining banks and other accounts for the government as special examiner?

A. Yes, some. That work had to do almost entirely with examining insolvent banks in the hands of a receiver, and the examining of receiver's books, and not the books of the Bank.

236 Q. Will you make an effort, or will you make an examination of the books and ascertain whether you can qualify yourself with reference to the matter above referred, and report the same to the plaintiff in this case, H. T. Jones, its president, or Mr. Norval, or myself?

A. Well, not knowing what that would require, I would not like to answer that question.

237 Q. Would you say that you will make an effort at all to qualify yourself to testify to matters hereinbefore referred to, and report as above?

A. Well, I am very frank to say I would much prefer not to. It puts a lot of burden on me which I don't care to assume, and I don't know whether I can do it anyhow.

1376 238 Q. Will you please state whether or not you will do it?

A. I prefer not to state that. It is a matter I would want to think about a little.

239 Q. How long do you want to think over it?

A. I can't tell that.

240 Q. How soon will you be able to tell that?

A. I can't tell that.

241 Q. Don't you think that by examining the books you could qualify yourself to testify as to what they showed, and qualify yourself so as to testify whether or not they are a part of the books, documents, and papers of the Capital National Bank?

A. I would not like to answer that. I cannot tell.

242 Q. Will you make an examination and qualify yourself to testify as to what books, documents, and papers in your possession as receiver are the books, documents, and papers of the Capital National Bank?

A. You mean all of the books and documents purporting to be books of the Capital National Bank?

243 Q. Yes Sir, or such as we may have to call on you for in

taking depositions hereafter, which I will state will not comprise near all of the books, documents, and papers of the
1377–1381 Bank?

A. I cannot tell whether I can, or whether I will.

244 Q. Can you tell whether or not you will make an effort to ascertain these facts above referred to?

A. No, I would not like to say that I will make an effort to do it. I don't know what labor it would involve, or whether I could do it or not, so that at this time I cannot say.

JOHN W. McDONALD.

Subscribed in my presence and sworn to before me this 11 day of April, 1902.

LO. RICKETTS,
[SEAL.] *Notary Public.*

* * * * * * *

1382 JOHN E. HILL, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposes and says as follows, viz:

Examined by R. S. NORVAL:

245 Q. Where do you reside Mr. Hill?

A. Lincoln, Nebraska.

246 Q. How long have you resided in Lincoln, Nebraska?

A. Eleven years.

247 Q. You may state what official position, if any, you ever held in the state of Nebraska?

A. I held the position of State Treasurer.

248 Q. From what time, and to what time, did you hold the position of State Treasurer of this state?

A. From the first week in January, 1889 to the first week in January, 1893.

249 Q. During the time you were holding the office of state treasurer of this state, and while the Capital National Bank, located at Lincoln, Nebraska, was in business, did you have any business relations or dealings with the Capital National Bank?

A. I did, as state treasurer.

250 Q. I now hand you Exhibit "A," which was identified by Mr. McDonald, Receiver of the Capital National Bank. You may examine that certificate, which bears number 21379, dated December 23rd, 1889, and payable to the order of J. E. Hill, Tr., for the face value of $50,000, and state if you ever had any transaction of that character with the Capital National Bank as state treasurer, or in any other capacity?

1383 A. I have no recollection of having any transaction of that character.

251 Q. You may state if you as state treasurer, or otherwise, deposited $50,000 with the Capital National Bank of Lincoln, Nebraska, on December 23, 1889, and received the original certificate of which Exhibit "A" is a copy?

A. I did not.

252 Q. You made no deposit of that kind or character at that time?

A. No sir.

253 Q. You may state if you ever received from the Capital National Bank, or any one for the Capital National Bank, the amount specified in this certificate, to-wit:—$50,000, on January 6, 1893, or at any other time, in payment of the same?

A. I did not.

254 Q. You may state whether you ever authorized any one to draw that amount, the amount of that certificate, from the Bank for you as state treasurer, or otherwise?

A. No sir, I never authorized any one.

255 Q. You may state if you ever endorsed this certificate, or authorized any one to endorse it for you?

A. No sir, I did not, not authorized any one to do it for me.

256 Q. I now hand you Exhibit "B," which has been identified by the preceeding witness, Mr. McDonald, receiver, which is certificate of deposit for $40,000, dated December 9, 1890, and payable to J. E. Hill, State Treasurer, bearing Number 23593, and signed by C. W. Mosher, Pt., and state if you ever saw that certificate before?

1384 A. I have no knowledge of ever seeing this certificate.

257 Q. You may state whether or not the certificate, Exhibit "B," which I have just handed you, and which is referred to in the preceeding question, represented a business transaction between you as state treasurer, and the Capital National Bank of Lincoln, Nebraska?

A. Yes, it did.

258 Q. You may state if you deposited with the Capital National Bank of Lincoln, Nebraska the amount specified in Exhibit "B" on the date therein specified?

A. Yes sir, there is no question but what the amount was deposited.

259 Q. You may state if you drew from the Bank the amount mentioned in the certificate about the date of its stamp "paid" on the face of the certificate, as state treasurer?

A. Yes, the amount evidently was drawn.

260 Q. How is that?

A. Yes sir.

261 Q. I now hand you Exhibit "C," which was identified by the preceeding witness, Mr. McDonald, receiver, which bears date April 24, 1891, payable to the order of J. E. Hill, Treas., for the face value of $100,250, bearing Number 24452, and ask you to state if you ever saw that certificate?

1385 A. I have no remembrance of seeing that certificate.

262 Q. You may state Mr. Hill if that certificate was ever in your possession as state treasurer, or otherwise, until it was produced here by the receiver today?

A. No sir, that never was held by me as state treasurer.

263 Q. You may state whether that represented a transaction

between you as state treasurer, or any one for you as state treasurer with the Capital National Bank?

A. No sir, I never had any such business transaction.

264 Q. You may state if you at that time, or at any other time, had a transaction with the Bank for that amount as state treasurer or otherwise?

A. No sir.

265 Q. You may state if you, or any one for you, or in your behalf, deposited that amount with the Capital National Bank at that time?

A. They did not.

266 Q. You may state whether you, or any authorized by you as state treasurer, or otherwise, drew that money on behalf of the state treasurer, or yourself?

A. No sir.

267 Q. Looking at the back of Exhibit "C," you may state if the endorsement upon the back of that in the following words: "J. E. Hill, Treasurer, By C. W. Mosher, Treasurer of the Neb.
1386 Relief Fund," was placed on there by your authority, your knowledge, your direction or your consent?

A. It was not.

268 Q. You may state if any portion of the money stated on the face of the certificate, Exhibit "C," was paid to you by the Bank, or to any one for you, as state Treasurer, or otherwise?

A. It was not.

269 Q. Was the endorsement placed on there by you?

A. It was not.

270 Q. Handing you Exhibit "D," which was identified by the preceeding witness, Mr. McDonald, receiver, bearing date July 18, 1891, for $14,650, and Numbered 24937, you may state if that represented an actual transaction between you as state treasurer, or otherwise, and the Capital National Bank?

A. It does not.

271 Q. You may state if you deposited with the Capital National Bank on the date the certificate bears date, July 18, 1891, $14,650, or any portion of it?

A. I did not.

272 Q. You may state if any funds, any amount of money, was ever at any time paid to you as state treasurer, or otherwise, or to any one else for you, in payment of Exhibit "D"?

1387 A. There was not.

273 Q. You may state if you at any time ever endorsed, or authorized any one to endorse, Exhibit "D"?

A. I never endorsed it, and authorized no one to endorse it for me.

274 Q. Is there any endorsement on the back?

A. No, there is no endorsement on the back.

275 Q. I now hand you exhibit "E," which is a certificate drawn for $10,000, bearing number 24941, dated July 20, 1891, payable to J. E. Hill, St. Treas., and will ask you to state whether that represents a transaction between you as state treasurer, or otherwise, with the Capital National Bank of that day?

A. It does not.

276 Q. You may state whether you upon that day, or any other time, deposited the money therein mentioned, or any portion of it?

A. I did not.

277 Q. You may state if on the 6th day of August, 1891, or any other time, the Capital National Bank, or any one for them paid to you, or any one for you, the amount of money, or any portion of the money, mentioned in the Exhibit?

A. They did not.

278 Q. You may state whether that was ever endorsed by you, or any one for you?

A. It was not endorsed by me. There is no endorsement on it.

1388 279 Q. Now handing you certificate of deposit issued by the Capital National Bank for $50,000, bearing date August 17, 1891, payable to the order of J. E. Hill, Treas., bearing number 25097, and identified by the preceeding witness, Mr. McDonald, Receiver, as Exhibit "F," I will ask you to state whether or not you had any transaction of that character at that time?

A. I did not.

280 Q. You may state whether or not you made a deposit of the amount mentioned in that certificate, or any portion of it, at that time or at any other time?

A. I did not.

281 Q. State whether or not on January 6, 1893, or at any other time, there was paid to you, or for you, by the Capital National Bank, or any one for the Bank, the amount specified in this certificate, or any portion of it, as state treasurer or otherwise?

A. There was not.

282 Q. You may state if there is an endorsement upon the back of certificate Exhibit "F"?

A. No sir.

283 Q. I now hand you Exhibit "G," which is a certificate that was identified by the preceeding witness, McDonald, receiver, bearing date August 5, 1891, drawn for $37,975, payable to the

1389 order of J. E. Hill, Treas., bearing number 25047, and will ask you to state if you deposited, or your office deposited, that amount with the Capital National Bank at that time?

A. Yes sir.

284 Q. You may state if the amount of funds, the full amount for which that certificate bears upon its face, was paid to you by the Capital National Bank, or its officers?

A. It was.

285 Q. And the endorsement upon the back of Exhibit "G" is made by who?

A. Made by myself by my deputy, George M. Bartlett.

286 Q. Your authorized deputy?

A. Yes, my authorized deputy.

287 Q. And the full amount mentioned on the face of that certificate was actually paid to the state treasurer in satisfaction of the certificate?

A. It was paid, yes sir.

288 Q. Handing you Exhibit "H," which was identified by the former witness, Mr. McDonald, receiver, being certificate of deposit issued by the Capital National Bank for $50,000, dated November 18, 1891, payable to the order of J. E. Hill, Treas., bearing number 25636, I will ask you to state if you as such treasurer, or otherwise, deposited the amount of money specified in the certificate at that time, or at any other time, or any part thereof?

1390

A. I did not.

289 Q. You may state if you as state treasurer, or otherwise, or any one for you as state treasurer, or otherwise, received from the Capital National Bank, on May 21, 1892, the $50,000 specified in this certificate, or any part of the same?

A. No sir.

290 Q. You may state Mr. Hill, turning to the back of Exhibit "H," if that endorsement, "J. E. Hill, Treas." was written by you, or any of your deputies, or any one authorized by you?

A. It was not written by me, nor did I authorize any person to write it.

291 Q. And neither yourself, nor the state treasurer, received any portion of the funds?

A. They did not.

292 Q. Handing you Exhibit "I," being certificate of deposit issued by the Capital National Bank, dated December 22, 1891, for $37,114.75, payable to the order of J. E. Hill, Treas., and numbered 25862, and being the certificate identified by the preceeding witness, Mr. McDonald, Receiver, you state if you deposited as state treasurer the amount of money mentioned therein upon that date?

1391

A. I did.

293 Q. You may state whether or not the Capital National Bank, on December 13, 1892 paid you the full amount of money specified in Exhibit "I"?

A. They did.

294 Q. And you may state, turning to the back of Exhibit "I," whose endorsement is on the back?

A. That was my endorsement as state treasurer, by my deputy, George M. Bartlett.

295 Q. That is a genuine endorsement?

A. Genuine endorsement, no question about that.

296 Q. Handing you Exhibit "J," which is an exhibit that was identified by the preceeding witness, Mr. McDonald, receiver, which is a certificate of deposit issued by the Capital National Bank for the face value of $38,114.75, bearing date December 22, 1891, payable to the order of J. E. Hill, Treasurer, and bearing number 25861, I will ask you to examine the same, and state if you know whether or not the amount of money specified was deposited by you, or any one for you, as state treasurer, or otherwise, with the Capital National Bank?

1392–1407

A. There was no such amount deposited by me, nor any portion of it, nor for me, nor by me.

297 Q. You may state whether or not you received from the Capital National Bank, or any one representing the Capital National Bank, either by yourself, or otherwise, as state treasurer, or otherwise, the amount of money mentioned in the certificate, or any portion of it, on December 22, 1891, or any other time?

A. I did not.

298 Q. Turning over the certificate, please examine the back, and state whether there is any endorsement on the back of the same?

A. No endorsement appears on the back of it.

299 Q. You may state whether you ever endorsed it or transferred it or authorized any one to do so?

A. I did not.

* * * * * * *

1408–1416 By stipulation of parties the signature to the deposition of John E. Hill is waived.

* * * * * * *

1417 STATE OF ILLINOIS, *County of De Kalb, ss:*

Depositions of sundry witnesses taken before me, Frank Langlois, Jr. a Notary Public within and for the County of De Kalb in the State of Illinois, on the 12th day of May, in the year A. D. 1902, between the hours of nine o'clock A. M. and six o'clock P. M. at the office of Carnes & Dunton, in the Town of Sycamore in said County, pursuant to the annexed notice to be read in evidence in behalf of the plaintiff in an action pending in the District Court of the Fifth Judicial District of Nebraska, in and for Seward County, in which the Jones National Bank of Seward, Nebraska, is plaintiff and Charles W. Mosher, *et al.*, are defendants:

Appearances R. S. Norval, attorney for plaintiff and J. B. Stephens, attorney for defendants;

D. J. CARNES, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposes, and sayeth, as follows: viz.—

Interrogatory One: State your name, age, residence and occupation.

Answer to interrogatory. My name is D. J. Carnes—age fifty four years, residence, Sycamore, Illinois—occupation, practising lawyer.

Interrogatory Two. State how long you have resided at Sycamore, Illinois.

Answer. Ever since November, 1873.

Interrogatory Three. Are you acquainted with C. W. and W. W. Marsh?

Ans. I am.

Four. How long have you known them?

Ans. Well, ever since I came here to town.

1418 Five. Where have they resided during that period?

Ans. C. W. Marsh has resided all the time in the Township of De Kalb adjoining the Township of Sycamore. W. W. Marsh,

I think, has had his residence here in the City of Sycamore all the time. His home has been here. He has been away portions of the time.

Interrogatory Six. Are you acquainted with the financial standing of C. W. and W. W. Marsh?

Ans. I am.

Seven. And have you been acquainted with their financial standing and property worth since January 1st, 1885 and up to and including the present time?

Ans. I have.

Eight. You may state what relation, if any, you have sustained to C. W. and W. W. Marsh during the time stated in the last preceding interrogatory.

Ans. I was one of their attorneys in troubles following the failure and continued to be so until they were practically through with those troubles. I have been engaged for W. W. Marsh in some matter or matters all the time since then. Have had no professional business to do for C. W. Marsh for some time past.

Nine. You may state, if you know, whether or not the parties above mentioned ever failed in business, and if so, give the date as nearly as you can.

Ans. I know that those parties failed some time in the Summer of 1884, if I remember it. I can't give the exact date without looking at memoranda. The Marsh Binder corporations in which their principal interests were, made an assignment at that time
1419 and that involved the Marsh Harvester Corporation in which they had interests and the firm of C. W. & W. W. Marsh in which name they had other properties and their own individual properties in such a way that they were unable individually or jointly in each of those capacities to pay their debts.

Ten. You may state, if you know, whether or not the firm of C. W. & W. W. Marsh have been solvent and able to pay their indebtedness since January 1885.

—. They have not.

Interrogatory Eleven. You may state if you were acquainted with the Marsh Harvester Company during the time it existed at Sycamore, Illinois.

Ans. I was from the time I came to Sycamore in 1873, and more particularly after I was admitted to the bar in September, 1875. The corporation antedates my acquaintance with it. The Marsh Harvester Company was located at Sycamore, Illinois. Its principal office and manufacturing plant was located here.

Twelve. You may state if you are acquainted with the financial standing and solvency of the Marsh Binder Company from January 1885 up to and including this time.

Ans. I was and am. I am not sure that that was the technical name of the corporation. It was the name it went by.

Thirteen. You may state what you know as to the solvency or insolvency of the Marsh Binder Company within the dates men-
1420 tioned in the preceding interrogatory.

Ans. Well, on January 1st, 1885, that corporation was in

the hands of an assignee under an assignment that had been made under our State Law in the preceding year. I was one of the attorneys for the assignee, and without looking up particular data, I could say that I know the assignee did not realize assets enough to pay in full the preferred claims of the laborers.

Int. Fourteen. Do you know whether or not there were sufficient assets of the firm to pay any portion of the general creditors of the firm or corporation.

Ans. I am positive that there was nothing whatever paid and no assets to pay anything whatever of the general creditors' debts.

Fifteen. Were you acquainted with the Sycamore Marsh Harvester Manufacturing Company located at Sycamore, Illinois?

Ans. Yes sir.

Sixteen. How long did your acquaintance extend?

Ans. That was the original Company that antedates my residence here and was nominally in existence until the assignment of the Binder Company but its business was transferred to the Binder Company. I knew the Company all the time from my first residence here and knew its affairs quite intimately after the time I was admitted to the bar in 1875.

Int. 17. You may, if you know, state whether or not the Marsh Manufacturing Company did any business in the way of manufacturing any machinery or commodities, or articles, after January 1st, 1885.

Ans. It did not.

1421 Int. 18. You may state whether or not you were conversant with the assets, the financial responsibility, of the Sycamore Marsh Harvester Manufacturing Company from January 1st, 1885 up to the present time.

Ans. I was and am.

Int. 19. You may state what it was.

Ans. It has not been a going concern since that time. Has had no asset of value since that time and has been always since that time, unable to pay any debt whatever.

Int. 20. You may state if you are acquainted with the Marsh Binder Manufacturing Company of Sycamore, Illinois.

Ans. I was.

Int. 21. And how long has your acquaintance been with the Company?

Ans. I know that from the time it organized, there was only one corporation that was known here by the name of the Marsh Binder Company. I think its full technical name was the Marsh Binder Manufacturing Company and any answer that I make here responsive to inquiries about the Binder Company refers to that Corporation, by whatever its technical name may be.

Int. 22. You may state how many companies or corporations there were in which the Marshes were interested in the manufacturing of farm machinery at Sycamore, Illinois.

Ans. There was originally the Marsh Harvester Company, as commonly called. Its technical name was, I think, the Marsh Harvester Manufacturing Company. The assets of that Company

were transferred for the most part to the Marsh Binder Com-
1422 pany, as commonly called. Its technical name was, I think, Marsh Binder Manufacturing Company. There was also the firm of C. W. & W. W. Marsh that did some manufacturing on the side, so to speak, in connection with the business of those two corporations.

Int. 24. And then aside from the technical name that you have just given in answer to the preceding interrogatory, there was no other corporations or firms transacting business at Sycamore, Illinois, or manufacturing machinery at this place, other than those you have given in which the Marshes, either C. W. or W. W. were interested.

Ans. Not that I know of. Of course either one of those men may have had some other little interest in some other business here, but nothing of any consequence.

Int. 25. And what do you say as to the solvency or insolvency and the ability of the Marsh Binder Manufacturing Company to pay and discharge its obligations from and since January 1885, up to and including the present time.

Ans. It has been unable to discharge any obligation since the 1st of January, 1885, except, as I have before said, the assignee did work out of the assets after January 1st, 1885, some small amounts of money that were applied on the preferred claims of laborers against the corporation.

Int. 26. And those payments were made under the provisions of your local law?

Ans. They were made under the provisions of our State insolvency law.

Int. 27. You may state if you know whether or not either the firm of C. W. & W. W. Marsh or the individual mem-
1423–1426 bers of the firm, or the Marsh Harvester Manufacturing Company, or the Marsh Binder Manufacturing Company, were, any or either of them possessed of property sufficient to pay their obligations since January 1st, 1885, and up to and including the present time?

Ans. They were not, as I understood it. I would not be able to positively say that in the last two or three years, that C. W. Marsh, for instance, might not have some asset to pay a debt but I know there were executions outstanding, following the failure of 1884, for large amounts that were and so far as I know, always have been uncollected and regarded uncollectible, that were against the property of these several concerns.

Int. 28. You may state if you know, you can approximately, about the amount of indebtedness of which executions have been unsatisfied.

Ans. I could not give figures without looking up documents and records. I know they were large amounts, running up into a good many thousands of dollars.

* * * * * * *

1427 Redirect:

Int. 1. To what failure do you refer in answer to the last cross interrogatory?

Ans. I refer to the time when the Binder Company made an assignment for the benefit of creditors in the Summer of 1884.

Int. 2. You stated that you were acquainted with the firms above mentioned and corporations above mentioned having commercial or farmers' papers as collateral security and that you knew something of its character. You may state what was the character of the paper, if you know, that was used by the C. W. & W. W. Marsh Company, The Sycamore Marsh Harvester Company, and the Marsh Binder Company and given as security which they or one of them owe the parties.

Ans. The commercial paper that these three concerns used here immediately before the failure in securing people, I know considerable about through efforts of myself and others to collect it and my recollection is that parties holding it did not succeed in collecting more than twenty-five or thirty per cent. of the face value of the papers.

Int. 3. You may state if you know anything about the
1428 character of the assets of the C. W. & W. W. Marsh, the Sycamore Marsh Harvester Company and the Marsh Binder Manufacturing Company which were owing by parties in other states and especially in the State of Nebraska.

Int. What time?

Q. During the years 1884 and thereafter.

Ans. I know that the assets of the Marsh Harvester Company by way of the commercial paper, were mostly old for the reason that that Company had gone out of active business some time before that date. They were consequently poor by reason of their age and efforts that had been made to collect out of those assets. I know that the paper of the Marsh Binder Company was most of it given on sale of what we know as the low down Binder and that the machine proved a failure and the payment of the paper was resisted and, therefore, that paper became very poor paper. The paper of C. W. & W. W. Marsh, was, I think, a good part of it, old and my recollection is that it was not any where near as much in amount as the other concerns. I do not recollect distinctly now what they manufactured and such, but I know in a general way that all the paper any and all of those had in the Summer of 1884 was very poor commercial paper.

Int. 4. And do you know of efforts being made to collect the several kinds of papers you have described in the preceding answer?

Ans. Yes sir, I do.

Int. 5. And State what efforts, if any, were made and give results.

Ans. The paper that was turned in as collateral immediately before the failure, went into the hands of various parties here.
1429 Quite a good deal of it went through this office and more of it went through other offices that I was familiar with.

Efforts were first made to collect by sending to Banks, or local collectors, and agents; Then afterwards a good share of that paper was put by various parties here into the hands of a bad debt collector at Rockford and I know that he had a very great amount of it. I have seen his books and lists and was interested in some of it myself. The paper was handled by him for quite a while, efforts made to collect it by having men in the field, securing it or collecting it or doing anything to aid in getting it in better shape and the upshot of all these methods of collection was, as I have said before, to get from twenty five to thirty per cent. of the money on these several kinds on the face value of the paper.

D. J. CARNES.

Subscribed in my presence and sworn to before me this 12th day of May, A. D. 1902.

FRANK LANGLAS, JR.,
[SEAL.] *Notary Public.*

P. M. ALDEN, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposes and sayeth as follows, viz.—

Int. 1. State your name, age, residence and occupation, and business.

Ans. My name is P. M. Alden—sixty seven years old—residence Sycamore, Illinois—not at present engaged in active business—banker by profession.

Int. 2. State how long you have resided in Sycamore, Illinois.

Ans. Since 1855, with the exception of about four years
1430 in Chicago prior to the time of the fire in 1871.

Int. 3. You may state if you are acquainted and have been acquainted with the firm of C. W. & W. W. Marsh, the Marsh Binder Manufacturing Company and the Sycamore Marsh Harvester Manufacturing Company—Corporations.

Ans. I am well acquainted and have been for the past thirty years at least, or from the time of the incorporation of the said Companies.

Int. 4. Were you acquainted with the above named companies and corporations prior to 1883?

Ans. I was.

Int. 5. You may state what was the business of the firm and companies named, at that time?

Ans. The business of C. W. & W. W. Marsh was mainly in managing and looking after business of the Marsh Binder Manufacturing Company. They had some little outside business of their own in a small manufacturing way but their main business was as managers for the Binder Company.

Int. 6. And what was the business of the Marsh Binder Manufacturing Company and the Sycamore Marsh Harvester Manufacturing Company?

Ans. Manufacturing binders—reapers and binders. They did some other manufacturing of farm implements.

Int. 7. And where were their factories and business located—at what point?

Ans. In Sycamore, Illinois.

Int. 8. Are they still in business?

Ans. They are not.

Int. 9. When did they cease doing manufacturing business?

1431 Ans. It was in June '84. Can't give the date—June '84.

Int. 10. And do you know the occasion of their going out of business?

Ans. I do.

Int. 11. You may state what that occasion was, and how they went out of business.

Ans. Judgments were obtained in the adjoining County for quite a large sum, other claims immediately presented and pressed for collection at that time, and the shops were at once closed.

Int. 12. And in what manner were they closed?

Ans. I think by the levy of the executions in the hands of the sheriff of this County.

Int. 13. Do you know anything about their conveying any property or making any assignment?

Ans. I know they did later on.

Int. 14. About when was that?

Ans. I think within a very few days. I should say the same week.

Int. 15. And since that time do you know whether they have transacted any business, any manufacturing business, or anything of that kind?

Ans. They have not.

Int. 16. Neither as a firm or corporation?

Ans. They have not.

Int. 17. You may state if you was associated in any business in which the Marshes, C. W. & W. W., or either of them, was connected in capacity of banker or otherwise.

Ans. I was.

Int. 18. State your relations with them in that capacity.

1432 Ans. In the years 1872-'73, the Marshes became large stockholders in the Sycamore National Bank of Sycamore, of which bank I was cashier from its opening, for more than twenty years. Both became directors at the time of purchase of stock and so continued until they sold said stock, prior to about 1883.

Int. 19. You may state if you were well acquainted with the financial worth and standing of the firm of C. W. & W. W. Marsh, also of the Marsh Binder Manufacturing Company and the Sycamore Marsh Harvester Manufacturing Company at the time of the failure in 1884.

Ans. I was.

Int. 20. You may state what was their financial condition at that time as to solvency or otherwise, and each of them, in August, 1884.

Ans. They were insolvent.

Int. 21. Each, the firm and corporations?

Ans. Yes sir.

Int. 22. You may state if you know what has been their conditions since that time, since August 1884 and up to and including the month of February, 1893, as to solvency or otherwise.

Ans. They continued to be entirely insolvent.

Int. 23. You may state, if you know, whether or not there was such a Company, either a firm or corporation, as the Marsh Binder Company?

Ans. There was such a Company, so called.

Int. 24. And was the Marsh Binder Company solvent or insolvent?

Ans. Insolvent.

Int. 25. From what time?

1433 Ans. From the time of the failure in June 1884 up to the present time.

Int. 26. You may state if there was such a firm or corporation as the Sycamore Marsh Harvester Company.

Ans. Not to my knowledge, except the one so called.

Int. 27. You may state, if you know, whether or not executions have been returned upon judgments rendered against the firm of C. W. & W. W. Marsh, Sycamore Marsh Harvester Manufacturing Company and the Marsh Binder Manufacturing Company, unsatisfied?

Ans. They have.

Int. 28. You may state, if you know, whether or not the Sycamore Marsh Harvester Manufacturing Company was in business as such in the years 1885-1886-1887-'88-'89-1890-1891-1892-1893.

Ans. It was not.

Int. 29. You may state, if you know, whether or not the firm of C. W. & W. W. Marsh was in business as such in the years 1885-'86-'87-'88-'89-1890-1891-1892 and 1893.

Ans. They were not.

Int. 30. You may state whether or not the Marsh Binder Manufacturing Company was in business at any time from January 1885 up to and including the month of March 1893.

Ans. It was not.

Int. 31. You may state with what Bank, if you know, the firm above named and the Companies and Corporations above named, transacted their business in Sycamore, Illinois, at the time of their failure.

Ans. Yes, I do.

1434 & 1435 Int. 32. Name the bank.

Ans. The Sycamore National Bank.

Int. 33. That was the Bank with which you were then connected?

Ans. It was, yes sir.

Int. 34. And how did you obtain your knowledge as to their financial standing and conditions for the years you have testified? Briefly.

Ans. The Bank made them loans continually and received from outside Banks and parties many items for collection.

* * * * * * *

1436 Redirect:

Int. 1. What knowledge did you have of the collateral papers in the hands of the Capitol National Bank of Lincoln?

Ans. I cannot give the dates but I was there in person some time, a year or two prior to the failure, and with Mr. Mosher, and the cashier I was shown a large amount of the paper.

Int. 2. How long was that before the failure of C. W. & W. W. Marsh, the Sycamore Marsh Harvester Manufacturing Company and the Marsh Binder Manufacturing Company?

Ans. As I have stated, I cannot give the exact date. I would say two years prior to that time.

Int. 3. Then you have no knowledge of whether or not the Capitol National Bank held any paper as collateral to the indebtedness of C. W. & W. W. Marsh and the several Binder and Harvester Companies at the time of the failure in 1884?

Ans. Only as I am informed they had some.

Int. 4. And you have no knowledge—personal knowledge—of their holding any collateral for any indebtedness of C. W. & W. W. Marsh, the Sycamore Marsh Harvester Manufacturing Company and the Marsh Binder Manufacturing Company in the years 1885 '86-'87-'88-'89-'90-'91-'92 and '93?

Ans. I have not.

Int. 5. Do you know whether or not any sum was realized out of the collaterals which you say was held by the Capitol National Bank against the several Marsh Companies at the time you were there some two years before the failure of the Marsh Companies here

1436½ in 1884?

Ans. I have not. I do not know that anything was collected.

Int. 6. Do you know, or did you know the value of the collateral that was put up with the Capitol National Bank of Lincoln, Nebraska, prior to the failure of the several Marsh Companies of Sycamore, prior to 1884?

Ans. Judging from subsequent events, I would think the papers were not worth over twenty-five cents on the dollar.

Int. 7. And you have no knowledge of any collateral given by any of the Marsh Companies above named to the Capitol National Bank for indebtedness which was made and incurred after the failure of the Marsh Companies at Sycamore in 1884?

Ans. I have not.

Int. 8. You may state, if you know, whether or not the notes which you say were in the Capitol National Bank at Lincoln, Nebraska, were there as collateral or were they being collected upon the account of Marsh Brothers, Mosher & Company?

Ans. They were there as I understood it and was told, both for collection and collateral for debts, to the Bank as I understood it.

Int. 9. And do you know that the proceeds were paid when collected upon the indebtedness of the several Marsh Companies?

Ans. I know nothing whatever as to that matter.

Int. 10. You have never examined any of the collateral notes

which you say you saw there some two years before the failure of the several Marsh Companies, which would be in the year, about 1882, since the failure of the Marshes?

1437–1440 Ans. I would say not to my knowledge. I do not know that I did.

Int. 11. Do you know anything of your own knowledge as to whether or not the assignee of the Marsh Binder Manufacturing Company attempted to collect the notes owned by the Company after the assignment?

Ans. I understood from him that he was attempting to collect them.

Int. 12. Do you know how he succeeded?

Ans. I do.

Int. 13. What was the result of his efforts?

Ans. Very little was collected.

Int. 14. Do you know whether or not any of the general creditors of the firm or Company was paid anything under the assignment.

Ans. They were not paid.

Int. 15. You may state if you know whether there was sufficient money to pay the preferred creditors, under the laws of the State of Illinois, which were the laborers?

Ans. There was not enough for that.

P. M. ALDEN.

Subscribed in my presence and sworn to before me this 12th day of May, A. D. 1902.

FRANK LANGLAS, Jr.,
Notary Public.

[SEAL.]

* * * * * * *

1441–1451 JOHN W. MCDONALD, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows—

Q. You may state your name and place of residence?

A. John W. McDonald; Lincoln, Nebraska.

Q. You are receiver of the Capital National Bank of Lincoln, Nebraska?

A. Yes sir.

Q. How long have you been receiver of that Bank?

A. Well, most four years, as I remember it; I think in the summer of 1898 I was appointed receiver.

Q. As such receiver you have in your possession and under your charge the books, documents, and papers of the Capital National Bank?

A. Yes.

* * * * * * *

1452 Q. You may produce "Record Book" Number "1" of the Receiver of the Capital National Bank?

A. I produce it.

Mr. THOMAS: The notary will identify that as Exhibit "65."
(Book so identified.)

Q. You may produce "Cash Book" Number "1" of the Receiver of the Capital National Bank?
A. I produce it.

Mr. THOMAS: The notary will identify that as Exhibit "66."
(Book so identified.)

Q. You may produce Ledger Number 1 of the Receiver of the Capital National Bank?
A. Here it is.

1453 Mr. THOMAS: The notary will identify that as Exhibit "67."
(Book so identified.)

Q. These books you have produced, except the last three, are all books of the Capital National Bank in your hands as receiver?
A. Yes, they all came into my hands as receiver of the Capital National Bank.
Q. I will ask you if you have in your possession as receiver of the Capital National Bank, and as a part of the nominal assets of that Bank, notes executed by the Western Manufacturing Company to the Capital National Bank?
A. I have twenty-four notes of $5000 each, and two of $2500 each, made by the Western Manufacturing Company.
Q. How are each of those notes signed?
A. Signed by the Western Manufacturing Company by E. Hurlbut Jr., Manager, except in one case, where there is a copy of the note, the original haveing been lost, and judgment for receiver's certificate having been allowed by the court; all of the rest are original notes.
1454 Q. Do you know the signature to those notes?
A. Yes, I think I know Mr. Hurlbut's signature.
Q. Are those notes signed in his hand writing?
A. Yes, I think they are.
Q. Do the notes bear any endorsement?
A. They all have endorsements.
Q. Do you know the hand writing of the endorser?
A. Many of them have more than one endorsement.
Q. You may state whether or not they bear the endorsement of C. W. Mosher as President?
A. All but two of them bear the endorsement of C. W. Mosher President.
Q. Are you acquainted with the signature of C. W. Mosher?
A. Yes, fairly so. It has been a long while since I have seen it,—a long while since I saw him write it,—but I think I know his signature fairly well.
Q. Are those notes you have referred to a part of the assets of the Capital National Bank now in your hands?
A. Yes sir.

Q. Were those notes a part of the assets of the Capital National Bank at the time of its suspension January 21, 1893?

1455 A. Yes.

Q. Have those notes been placed in judgment by the receiver of the Capital National Bank?

A. I cannot tell you without looking up the records.

Q. Has the receiver attempted to collect them?

A. I have not.

Q. If not, why not?

A. Because there is no one to collect them from. All efforts were exhausted by the former receivers to collect these notes.

Q. You may explain more fully what you mean by "no one to collect them from"?

A. I never was able to discover that the Western Manufacturing Company had any assets of any kind.

Q. Do you know of such a Company being in existence?

A. There was a Company that bore that name, but I never understood that they had anything.

Q. Who, if any one, constituted the Company, if you know?

A. I don't know.

1456 Q. The Company that bore that name, where did it do business?

A. I think in Lincoln.

Q. Where was its principal place of business?

A. I think in Lincoln.

Q. At what place of business in Lincoln?

A. Of my own knowledge I do not know. I only know by repute, that is all.

Q. What do you know by repute?

A. Well, I always understood it was one of Mosher's companies.

Q. Was there another Western Manufacturing Company that was regularly incorporated, of which M. D. Welch was an officer, or manager?

A. Yes, I think there was.

Q. That was not the Company that executed these notes you have in your possession?

A. I think that was not the same Company.

Q. You have made inquiry to ascertain if it were, have you, in your effort to ascertain whether these notes were collectible?

1457 A. I think I said the former receivers exhausted their resources in trying to collect these notes, and I have never given them any attention at all. I understood them to be worthless.

Q. Have you satisfied yourself that they are worthless?

A. Yes.

Q. Utterly worthless?

A. Yes sir, and always were, that is my understanding.

Q. Do you know that the former receivers exhausted all remedies to collect these notes?

A. Yes, I am very sure they did.

Q. This Company purporting to bear the name Western Manufac-

turing Company, which executed these notes, signed by E. Hurlbut, Jr., Manager, was never in fact incorporated?

A. Yes, I think that was the case.

Q. And so far as you were able to ascertain or learn, never had any assets?

1458–1462 A. So far as I have been able to ascertain, none.

Q. And their paper and notes were never of any value?

A. No, never of any value.

Q. You may state, if you know, whether these notes you have produced were ever sold or discounted by the Capital National Bank to anyone?

A. They were rediscounted.

* * * * * * *

1463 MAY 15, 1902—9 a. m.

Direct examination of JOHN W. MCDONALD continued:

Q. In your testimony yesterday you referred to notes of the Western Manufacturing Company signed by E. Hurlbut Jr., Manager, given to the Capital National Bank, consisting of twenty-four notes for $5000 each, and two notes for $2500 each, three of which were identified as Exhibits 68, 69, and 70. I now hand the remaining twenty-three notes to the reporter and ask that they be identified as Exhibits commencing with Number 71, and to be numbered consecutively up to and including Number 93.

(Notes so identified.)

Q. I now hand you Exhibits Numbered from 68 to 93, inclusive, except Exhibit 86, being the notes of the Western Manufacturing Company to which you testified yesterday, and ask you if you are acquainted with the signature of the maker attached to each of those notes?

A. Yes, I think I know the signature.

Q. Whose signature is it?

A. I think it is the signature of E. Hurlbut Jr.

Q. In what capacity, if any?

A. It is signed Manager.

1464 Q. Manager of what?

A. The notes are signed Western Manufacturing Company, E. Hurlbut Jr. Mgr.

Q. You may state if these notes were executed to and taken into as a part of the assets of the Capital National Bank during its existence?

A. The books of the Bank show that they were assets of the Capital National Bank.

Q. By the Books of the Bank, you mean the books of the Capital National Bank which are in your hands as receiver?

A. Yes.

Q. And these notes just referred to were taken in by the Bank, and carried by the Bank during its existence as a part of its assets?

A. Yes.

Q. And these notes above referred to, and now in your hands, are in your possession as Receiver of the Capital National Bank?

1465 A. They are in my hands as trustee.

Q. You may state fully what you mean by that?

A. The notes were rediscounted by the Capital National Bank, and they were turned back to the receiver to be collected by him, if possible, the receiver issuing certificates for the amount of the notes to their respective owners.

Q. Is the same true of Exhibit Number 86, where the original note has been lost?

A. Yes.

Q. And receiver's certificate has been issued for that note in the sum of $5000?

A. Yes.

Q. Being receiver's certificate Number 1094?

A. Yes.

Q. These notes identified as Exhibits 68 to 93, inclusive

1466 were sold by the Capital National Bank prior to its suspension, did you state?

A. Yes.

Q. Were these notes endorsed?

A. Yes.

Q. You may state if you are acquainted with the signature of the endorsement on each of the notes identified as Exhibits 68 to 93, inclusive?

A. Yes, I think so.

* * * * * * *

Q. These notes identified as Exhibits 68 to 93, inclusive had been sold, and were owned by parties other than the Capital National Bank at the time of its suspension and failure?

1467–1470 A. Yes.

* * * * * * *

1471 Q. Have these notes been allowed by the receiver as claims against the Capital National Bank?

A. Yes.

Q. For what amounts?

A. Exhibits from Number 68 to 91 inclusive are for $5000 each, and 92 and 93 are for $2500 each.

Q. These notes referred to have been allowed for these amounts by the receiver, and have certificates been issued by the receiver for those various amounts?

1472 A. Yes.

* * * * * * *

1473 Q. Are you able to state what items of the Capital National Bank's assets came into the hands of the receiver following its suspension?

A. Yes.

Q. Are you able to state what amounts have been realized by the receiver from these assets of the Capital National Bank?

A. Yes.

Q. Are you able to state the amount of the liabilities against the Capital National Bank allowed by the receiver?

A. Yes.

Q. Are you able to state the amount of dividends that have been paid by the receiver to the creditors of the Capital National Bank on their several claims?

—. Yes.

Q. I will ask you to state what amount of assets
1474–1483 came into the hands of the receiver of the Capital National Bank classed under the head of "Cash Items"?

A. I would have to refer to the ledger to answer that. I cannot keep those figures in my head.

Q. You may refer to the ledger?

* * * * * * *

1484 THOMAS: I now repeat my original question, and ask you to state from an inspection of the books referred to what amount of assets came into the hands of the receiver classed as cash items on the books?

A. Do you want the aggregate, or do you want it in its two classifications?

Q. You may give it in its two classifications.

A. Cash items, good, $12,531.27; cash items, worthless, $799.41.

Q. Now you may state, if you know, the amount of cash of the Capital National Bank that came into the hands of the receiver at the time of the suspension of the bank, or following the suspension of the Bank; that is, at the time the receiver took possession of the assets?

1485 A. $15,385.87.

Q. You may state, if you know, the amount of assets that came into the hands of the receiver immediately following the suspension of the Bank, classed as "overdrafts."

A. Doubtful, $17,834.63; worthless, $15,932.57.

Q. Total, how much?

A. $33,767.20.

Q. You may state, if you know, the amount of assets that came into the hands of the receiver of the Bank indicated on the books as bills of exchange?

A. Good, $3484.94. Doubtful, $1456.08; worthless, $56.95; total, $4997.97.

Q. You may state, if you know, the amount of assets that came into the hands of the receiver of the Bank indicated on the books as furniture and fixtures?

1486 A. $300.

Q. You may state the amount of assets which came into the hands of the receiver of the Bank classed on the books as stocks and bonds?

A. $325.

Further hearing adjourned until 2 P. M., May 15, 1902.

Witness McDONALD, Continued.

Q. You may state the amount of assets that came into the hands of the receiver of the bank classed as excess bonds?

A. $5000.

Q. You may state the amount of assets that came into the hands of the receiver of the Capital National Bank which consisted of bills receivable, or notes?

DEWEESE: Let me inquire what book are you examining to ascertain that?

A. I am examining the records, the receiver's record.

Q. Receiver's books?

A. Yes sir.

1487 A. The good are $298,325.39; doubtful, $155,560.84; worthless $397,073.63; total, $850,959.86.

Q. In this amount is there included bills receivable or notes which had been rediscounted or sold, and which were merely held by the receiver as trustees for the various holders of the discounted paper?

A. All the rediscounted paper is included.

Q. Now you may state how much rediscounted or sold bills receivable was included in the sum of $298,325.39, to which you have testified?

A. $187,270.56.

Q. You may state how much rediscounted or sold bills receivable is included in the sum of $155,560.84, to which you have testified?

A. $29,375.14.

Q. You may state how much bills receivable or notes rediscounted or sold are included in the sum of $397,073.63, to which

1488–1491 you have testified?

A. $114,714.16.

Q. Have you computed the total of rediscounted or sold notes?

A. $331,359.86.

* * * * * * *

1492 Q. I think that answers that. Now you may state what assets were required by the receiver after the suspension of the Bank?

1493 A. Doubtful, $11,510.49; worthless, $19,428.91; good, $27,972.04; making a total of $58,911.44.

Q. Is there anything under this head classed as real estate?

A. Yes.

Q. You may state how much assets the receiver has received under this head?

A. $86,975.

Q. You may state if the receiver has come into possession of any assets that accrued after the failure of the bank and its suspension?

A. Yes.

Q. You may state, if you know the amount?

A. $11,065.75.

Q. From what source was that received?

A. Oh, well, that was from various items, rent and interest; oh, no, this is rent. I have another account,——

Q. It consists of rent derived from real estate accruing after the failure of the Bank?

A. Yes.

Q. What other account have you under this head?

1494 A. Interest account.

Q. You may state, if you know, how much was realized from that source?

A. $10,498.93.

Q. That was realized on interest accruing after the failure of the Bank was it not?

A. Yes.

Q. You may state Mr. McDonald if anything was realized by the receivers from any other sources?

A. Stock assessments.

Q. You may state, if you know, how much was realized from stock assessments?

A. $155,598.20.

Q. You may state what that consisted of, and how it was obtained?

A. An assessment of 100 per cent. was levied on the stock.

Q. By whom was that levied?

A. By the comptroller, and that much was paid.

Q. What was the purpose of the assessment?

A. To make up the deficiency in the assets.

Q. Who made that assessment necessary?

1495 A. Because the law required it under the showing, I suppose.

Q. Under what showing?

A. They make up as soon as possible after the failure of a bank, as soon as the receiver becomes familiar with the assets, he makes an estimate of their value, and on that the assessment is made, if any. I presume it was so done in this case, but I don't know.

Q. After the receiver takes charge of the assets, if it is found that the assets are not sufficient to pay the liabilities, an assessment is made on the stockholders?

A. Yes sir.

Q. Now the amounts, referring to the assets on hand at suspension, to which you have testified, were the nominal value of those assets at that time, and not the actual value; state whether or not that is correct?

A. I have no knowledge of that at all. I was just telling you the custom that prevailed with failed banks. This deficiency statement was made up long before the time I had any connection with it, and I presume,——

1496 Q. You stated in your examination this morning you knew how much had been actually realized from the various assets of the Bank; I will now ask you to state, if you know, what was realized in cash by the receiver upon assets known as "other than bills receivable"?

A. From "other assets," which is the term used in our reports, there has been collected the sum of $33091.31.

Q. You may state what items comprise this sum of $33,091.31?

A. Cash, $15,385.87; furniture and fixtures, $300; stocks and bonds $325; excess of bonds, $3250; Cash items, $4280.85; Bills of exchange, $4778.02, overdrafts $4771.57 (L. A. R. N. P.)

Q. Now you may state, if you know, what was realized by the receivers from bills receivable or notes of the Capital National Bank?

A. $229,520.82.

Q. Can you give the items comprising that amount?

A. Well, what do you mean, under what classification they are, and whether good or not.

Q. Yes.

1497 A. Yes, I guess I can. $210,462.07, good.

Q. Of this amount of $229,520.82, which you say is the total received from bills receivable, you may state how much of that, if any, was collected for bills rediscounted, or notes that had been sold to other parties, and which were collected by the receiver merely as trustee for the various holders?

A. I could not tell that without going over the account in my ledger under the head of "loans paid and other disbursements," and picking out all of those items.

(Witness goes over account.)

Q. If you have gone over that account, as stated, you may give the necessary information?

A. I find that loans paid and other disbursements account shows that there was paid for rediscounted paper collected $188,020.56, which being deducted from the sum of $229,520.82 would give the amount realized on bills receivable belonging to the Bank.

Q. Now you may state, if you know, how much was collected and realized by the receiver on account of "assets acquired after suspension"?

1498 A. $105,902.95.

Q. Now you may state how much, if any, of this was realized from rents which accrued during the receivership?

A. Not any of it.

Q. That consisted of assets classed on the books as "other assets, both good, doubtful, and worthless"?

A. Yes sir.

Q. Now you may state how much was received by the receiver on account of rents which accrued after the suspension of the bank and during the existence of the receivership?

A. From premium, interest, rents, $20,299.56.

Q. The portion of this which comprises interest refers to interest which accrued after suspension?

A. Interest collected after suspension. I think it is possible that a little of it may have accrued prior to suspension.

Q. Can you give the items of rents and interest separately?

A. Yes, I think so. I find I am mistaken, that I gave the wrong amount. It is $21,564.68.

Q. And are there any deductions there for offsets?

A. The amount should be $21,549.56.

Q. Was any of that for premium on bonds?

A. No, that is just a name given the account, it is all for interest and rents.

1499 Q. Accruing after suspension?

A. Well, mostly. I s-ould not like to say that a small amount of interest might not have accrued prior to suspension.

Q. Substantially?

A. Yes.

Q. How much was realized by the receiver on account of assessments which were levied on stockholders, as referred to in a former portion of your testimony, in accordance with the order of the comptroller?

A. $155,598.20.

Q. Now is that all the moneys that have been received by the receivers from the assets of the Capital National Bank and the assessment on the stockholders since its failure on January 21, 1893 to this date?

A. Yes.

Q. Out of this amount, what disbursements have been made by the receivers, if you know?

A. Loans paid and other disbursements, $59,764.59.

Q. Now you may state what was the nature of these disbursements, what they were for?

1500 A. Into that account is charged all moneys paid out for the betterment of the assets. No expenses are charged in that account. Where taxes are paid, or repairs made to the property, or a loan on a property is paid off: anything that betters the asset goes into that account.

Q. It does not include any general liability of the bank filed as a claim with the receiver?

A. No.

Q. What other items of expenditures or disbursements have been made by the receiver?

A. I have paid out in dividends $211,300.93.

Q. That is the total amount of dividends that have been paid to the creditors of the Capital National Bank up to date?

A. Yes sir.

Q. What other disbursements have been made by the receiver?

A. Legal expenses, $49,616.33.

Q. What other amounts?

A. Receiver's salary, $20,985.

Q. Any other expenses, if so state?

A. Under the head of other expenses has been paid $12,774.41.

Q. Are those all of the disbursements that have been made

1501 by the several receivers?

A. Yes sir.

Q. You may state how much, if anything, is on hand in your hands, or with the Comptroller of the Currency, belonging to the assets of the Capital National Bank?

A. $3261.02.

Q. You may state if you know what are the amounts of the

various liabilities that have been allowed against the Capital National Bank?

A. Yes, I do.

Q. You may state what were the liabilities of the Capital National Bank at the time of its failure to various national banks as allowed by the receiver?

A. $47,759.56.

Q. You may state what was the amount of the liabilities of the Capital National Bank at the time of its failure to various state banks, and which amounts were allowed by the receivers and receivers' certificates issued therefor?

1502 A. $114,349.62.

Q. The item to which you referred previous to this comprising $47,759.56, this has been allowed by the receiver, and receiver's certificate issued therefor?

A. Yes.

Q. You may state what were the liabilities of the Capital National Bank at the time of its failure on account of individual deposits which were allowed by the receivers and receivers' certificates issued therefor.

A. $392,639.64.

Q. You may state what were the liabilities of the Capital National Bank at the time of its failure on account of certificates of deposit outstanding and for which claims were allowed and receivers' certificates issued therefor?

A. $517,999.49.

Q. Now you may state what were the liabilities of the Cap-

1503 ital National Bank at the time of its failure for bills receivable or notes which had been sold, endorsed, and guaranteed, which were allowed by the receiver as claims against the bank and receiver's certificates issued therefor?

A. $331,359.86.

Q. Now you may state if there were any other claims that the Bank was owing at the time of its suspension that were presented to the receiver, allowed by him, and receiver's certificates issued therefor, and if so state the nature of the claims and the amount allowed?

A. I know the total number of certificates allowed, the total number issued. When you divide it up the way you have here it becomes confusing.

Q. Consisting of what?

A. Also an item of $5500, and one of $954; claims in dispute $13,290.94.

Q. Is that all the liabilities, excepting the capital stock, Mr. McDonald?

A. Yes, I think so.

1504 Q. And the capital stock was how much, at the time of its failure?

A. $300,000.

* * * * * * *

Q. I will now ask you to produce the following books, namely:—Journal of Marsh Brothers, Mosher & Company; Bills Discount

register of Marsh Brothers Mosher & Company; Bills discounted Register of the Marsh National Bank; Bills discounted Register Number "1" or "A" of the Capital National Bank; Certifi-
1505 cate of deposit register of the Capital National Bank, including record of certificates from Number 1 to 16249, inclusive; certificate of deposit register of the Capital National Bank including certificates of deposit from 26305 to 28412, inclusive; Journal of the Capital National Bank, including and containing entries of the Capital National Bank from January 1, 1889 to April 1, 1890; interest book, containing items of interest received by the Capital National Bank from January 1st, 1887, to July 1st, 1888; book of the Capital National Bank containing all entries and items for interest paid by the Capital National Bank during the entire period of its existence; teller's book of the Capital National Bank of bills discounted for the year 1886?

A. I am not able to find any of these books.

Q. Have you made a search for those books, Mr. McDonald?

A. Yes.

Q. Diligent search?

A. Yes.

Q. And you are certain they cannot be found?

A. I am certain I have not been able to find them after diligent search.

Q. Do you know if any of those books were among the books of the receiver at the time you took charge of the receivership, and possession of its books?

A. No sir, I don't know anything about it. I never saw any of them.

Q. You have no recollection of ever having seen any of those books?

A. No sir.

1506 & 1507 Q. Do you think further search for the books would avail anything?

A. No sir.

* * * * * * *

1508 Q. Now you may state what bills receivable, if any, came into the hands of the receiver as assets of the Capital National Bank at the time of its failure of Charles W. Mosher, its president?

A. $85,281.67.

Q. Have you succeeded in collecting anything on those notes?

A. No.

Q. They still remain in your hands unpaid and uncollectible?

A. Yes.

Q. You may state what notes of Edwin W. Mosher, or
1509 E. W. Mosher, if any, came into the hands of the receiver as assets of the Capital National Bank at the time of its failure?

A. $107,085.45.

Q. Are those notes still in your possession as receiver?

A. Yes.

Q. Has any part of those notes, any portion of them been collected?

A. Yes.

Q. How much?

A. On one note, on note numbered 134007, for $12,730.01, there has been $9426.60 paid.

Q. When was that paid, and by whom?

A. Well, that was paid in April, 1893 from the sale of horses.

Q. Was that note secured by a mortgage on horses, which was foreclosed and the proceeds applied on this note?

A. Yes, I believe so.

Q. Is that all that has been realized on any of those notes of Edwin W. or E. W. Mosher?

A. Yes.

Q. You may state what notes of R. C. Outcalt, or Richard C. Outcalt, if any, came into the hands of the receiver as assets of the Capital National Bank at the time of its failure?

1510 A. $54,166.66.

Q. Are those notes still in your possession as receiver?

A. No, they are not.

Q. Do you know where they are?

A. Why, they were turned over to attorneys in trust for collection.

Q. They are still in your control as receiver, and part of the nominal assets of the Capital National Bank?

A. Yes, what I meant was that the original notes are not in my hands.

Q. Has any portion of those notes been collected?

A. On one note there has been an offset of $570.99.

Q. What note is that?

A. Note of $6240.

Q. Have any portion of those notes been collected?

A. No.

Q. You may state what notes, if any, of W. H. Barstow came into the hands of the receiver as assets of the Capital National Bank at the time of its failure?

A. I can't find but $2,788.75, that is all the records show.

1511 Q. You may state the number and amounts of the notes you find on your record that were executed by Mr. Barstow?

A. No. 46653, $1508.00; No. 116078, $50; No. 116078, $100; No. 1199, $1130.75.

Q. Is that all you find?

A. Yes, that is all.

Q. If there were any more that were held by the bank at the time of its suspension, they have not come into your possession?

A. That is all the books show.

Q. Are those you speak of now in your possession or under your control as receiver?

A. All but one of them, one for $1508 has been paid.

Q. Have any of the rest of the notes of Mr. Barstow been paid?

A. On note of $1130.75 there was payment April 8, 1893 of $162.08.

Q. By whom were these payments made?
A. Well, I don't know; that was before my time. I suppose they were made by Mr. Barstow.
Q. Do you know if there was any security for these notes?
A. Well, the records show that these payments were made from proceeds of the sale of horses.
Q. You may state what notes, if any, signed by Mosher and Outcalt came into the hands of the receiver as assets of the Capital National Bank at the time of its failure?
A. $5635.
Q. Is that note in your possession or under your control
1512 as receiver??
A. Yes.
Q. Has any part of that note been paid?
A. No.
Q. State what notes, or bills receivable, if any, of W. T. Scott came into the hands of the receiver as assets of the Capital National Bank at the time of its failure?
A. I don't find any such notes.
Q. Do you find some with another initial? Do you find any notes that came into the hands of the receiver as assets of the Capital National Bank executed by Mary C. Scott?
A. Yes.
Q. What is the amount of those notes?
A. $13,000.
Q. Are those notes in your possession or under your control as receiver of the Capital National Bank?
A. Yes.
Q. Has any part of them been collected?
A. No.
Q. You may state what notes, if any, signed by W. A. Sharar came into the hands of the receiver as assets of the Capital National Bank at the time of its failure?
1513 A. $7153.76.
Q. Are those notes now in your possession or under your control as receiver of the Capital National Bank?
A. Yes.
Q. Have you been able to collect any portion of them?
A. No.
Q. You may state what notes, if any, of C. E. Turk came into the hands of the receiver as part of the assets of the Capital National Bank at the time of its failure?
A. $7289.10.
Q. Is that note in your possession or under your control as receiver of the Capital National Bank?
A. Yes.
Q. Have you been able to collect any portion of it?
A. No.
Q. You may state what note, if any, of the Sycamore Marsh Harvester Company came into the hands of the Receiver as a portion of the assets of the Capital National Bank at the time of its failure?

A. $4500.

Q. Is that note in your possession or under your control as receiver of the Capital National Bank?

A. Yes.

1514 Q. Has any part of it been collected?

A. No.

Q. You may state if the note of Marsh & Hinds came into the possession of the receiver of the Capital National Bank as a part of the assets of the bank at the time of its failure?

A. $1000.

Q. Is that in your possession as receiver as a part of its assets?

A. Yes.

Q. Has any part of it been collected?

A. No.

Q. You may state what notes, if any, signed by the Marshes, C. W. and W. W. Marsh, came into the hands of the receiver as a portion of the assets of the Capital National Bank at the time of its failure?

A. I find one note of $3600 signed by C. W. and W. W. Marsh; one note of $9000 signed by Marsh Binder Manufacturing Company; and one note for $200 signed by James Marsh.

Q. Are those notes in your possession as receiver of the Capital National Bank, and a part of its assets?

1515 A. Yes.

Q. Has any part of them been collected?

A. No.

Q. You may state what note, if any, of the Southern Stave & Lumber Company came into the possession of the receiver as a portion of the assets of the Capital National Bank at the time of its failure?

A. $5346.15, that was a rediscount note.

Q. Was that note filed with the receiver as a claim against the Capital National Bank, and allowed?

A. Yes.

Q. And receiver's certificate issued therefor?

A. Yes.

Q. Have you collected any portion of that note?

A. No.

Q. Among the assets of the Capital National Bank which came into the hands of the receiver, was there an item consisting of overdrafts of the bank at the time of its suspension?

A. Yes.

1516 Q. You may state if among those items of overdrafts there was one of C. W. Mosher, president of the bank?

A. Yes.

Q. For what amount?

A. $2927.59.

Q. Was there one of Mosher & Outcalt, the president and cashier of the bank?

A. Yes.

Q. For what amount?

A. $8983.36.
Q. Was there one of J. E. Hurlbut Jr.?
A. Yes.
Q. For what amount?
A. $1756.09.
Q. Was there one of the Western Manufacturing Company, of which Hurlbut was manager?
A. Yes.
1517 *A. Yes.*
Q. What amount?
A. $1361.79.
Q. Was there one of Stark & Mosher?
A. Yes.
Q. For what amount?
A. $1691.84.
Q. Are these items of overdraft still in your possession as a nominal asset of the Capital National Bank?
A. Yes.
Q. Has any portion of them been collected?
A. No.
Q. Now, Mr. McDonald, have you endeavored to convert into money collect, and realize upon all of the assets of the Capital National Bank?
A. Yes.
1518 Q. And have you used your best efforts, and exhausted all means to collect something on them?
A. Yes.
Q. Would it be possible to collect any more, or realize any more upon any of the assets of the Capital National Bank than has been realized upon them up to this date?
A. I think it is doubtful, but I would not like to say it would not be possible.
Q. In your opinion, do you think anything more can be realized on any of the remaining assets of the Capital National Bank?
A. I think a little can be realized.
Q. About how much?
A. Oh, I don't know, I never figured it up. I think the assets would sell for a little something at public sale; that they would pay a little something to get these judgments out of the way.
Q. A nominal amount?
1519 & 1520 A. Yes, I presume so.
Q. Since you have been receiver you have endeavored to realize on all of the assets of the Capital National Bank?
A. Yes.
Q. Are the remaining assets of the Capital National Bank valuable, or not valuable, excepting what may be realized upon them at public sale?
A. Oh, I think they have very little value?

* * * * * * *

1521 Q. You may state, if you know, the amount of money which the Bank of Staplehurst, Nebraska had on deposit in the Capital National Bank at the time of its failure?

A. $14,264.11.

1522 Q. State if the amount of that deposit was allowed by the receiver of the Capital National Bank, and a receiver's certificate issued to the Bank of Staplehurst therefor?

A. Yes.

Q. You may state the amount of money that the Jones National Bank of Seward, Nebraska, had on deposit in the Capital National Bank at the time of its failure?

A. $17,529.23.

Q. You may state if the amount of that deposit was allowed by the receiver of the Capital National Bank and a receiver's certificate issued therefor?

A. Yes.

Q. You may state if you know, the amount of money, if any, that the Utica Bank of Utica, Nebraska had on deposit in the Capital National Bank at the time of its failure?

A. $7497.17.

1523 Q. State if the amount of that deposit was allowed by the receiver, and receiver's certificate issued therefor?

A. Yes.

Q. You may state, if you know, the amount of money that Thomas Bailey had on deposit in the Capital National Bank at the time of its failure?

A. $11,500.

Q. State if the amount of that deposit was allowed by the receiver and receiver's certificate issued therefor?

Q. You may state, if you know, the amount of money that Isaac Holt had on deposit in the Capital National Bank at the time of its failure?

A. $5000.

Q. State if the amount of that deposit was allowed by the receiver and receiver's certificate issued therefor?

1524–1539 A. Yes.

Q. You may state what dividend has been paid on these claims by the receiver out of the assets of the bank?

A. Seventeen per cent.

Q. One dividend of ten per cent., one of five per cent., and one of two per cent.?

A. Yes.

* * * * * * *

1540 Witness McDONALD recalled by plaintiff.

Examined by Mr. THOMAS:

Q. You have in your possession certificates of deposit of the Capital National Bank which have been identified by the Notary as Exhibits from 147 to 923½, inclusive?

A. Yes sir.

Q. Are those certificates of the Capital National Bank outstanding and unpaid at the time of its failure?
A. Yes.
Q. Were those certificates filed with the receiver?
A. Yes.
Q. And you may state if the amount called for by each of those certificates was allowed by the receiver?
A. Yes.
Q. Was a receiver's certificate issued representing the amount called for in each of those certificates you have identified?
A. Yes.
Q. Have the certificates referred to as Exhibits 147 to 923½, inclusive been compared with the receiver's records to
1541–1583 ascertain whether they agree with the amounts shown by the books of the receiver as having been allowed on the certificates?
A. Yes.
Q. And have the amounts specified in each of those certificates and for which they were issued, been allowed by the receiver as a claim or charge against the Capital National Bank?
A. Yes.
Q. Referring to the value of the remaining assets in your hands belonging to the Capital National Bank, you may state if, since your testimony yesterday, an order has been made by the department, ordering the remaining assets of the Capital National Bank to be sold?
A. No.
Q. There has been no such order?
A. No.
Q. Do you know if the assets are to be sold?
A. I recom-ended that they be sold.
Q. You have recommended that the assets remaining in your hands as receiver of the Capital National Bank be sold at public sale?
A. Yes.

1584 MAY 16—two o'clock p. m.

RICHARD C. OUTCALT, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:—

Q. You may state your name and place of residence?
A. Richard C. Outcalt, Lincoln, Nebraska.
Q. How long have you resided in Lincoln, Mr. Outcalt?
A. Thirty-one years.
Q. What has been your occupation during that time?
A. I was in the bank from 1870 to '93.
Q. You may state what Bank?
A. James Sweet & Brock,——
Q. How long were you with that firm?
A. I could not tell you. State Bank of Nebraska; State Bank;

Marsh Brothers Mosher & Company; Marsh National Bank; and Capital National Bank. You can divide the time up to suit yourself.

Q. Then continuously from 1870 to 1893 you were in the banking business?

A. Yes sir.

Q. Did the Capital National Bank fail, and if so, when?

A. January, 1893.

Q. Do you know what day in January it suspended?

A. No, I don't.

Q. Calling yo-r attention to the date, was it January 21st?

A. It was the 21st or 23rd, somewhere along there.

Q. Now when was the Capital National Bank organized?

A. I am not sure, in 1883 or 1884.

1585 Q. Did it always bear that same name, or did it formerly do business under a different name?

A. It could not do that.

Q. Did it succeed some other Bank?

A. We changed the name from Marsh National Bank to Capital National Bank.

Q. What bank, if any, did the Marsh National Bank succeed?

A. It didn't succeed any. When a man organizes a national bank it doesn't succeed any bank; that doesn't happen in the history of banking as I understand it.

Q. Did it assume the banking business of any other bank?

A. It might have had some of the customers, but had none of their books or stationery, but might have had some of the customers.

Q. And some of the paper?

A. I don't remember about that.

Q. How long did Marsh Brothers Mosher & Company do a banking business in Lincoln?

A. I don't remember, I have forgotten.

Q. About how long?

A. I don't know.

Q. When did they cease doing business with reference to the time the Marsh National Bank was organized?

A. I don't know.

1586 Q. Did not Marsh Brothers Mosher & Company cease doing business as bankers immediately preceding the time the Marsh National Bank was organized and commenced business?

A. That is possible, probably.

Q. You were in the employ of Marsh Brothers Mosher & Company?

A. No sir, I was one of the firm.

Q. What were your duties in connection with the banking firm of Marsh Brothers Mosher & Company?

A. I could not tell you.

Q. Was it a corporation or partnership?

A. Partnership.

Q. Who were the members of the partnership?

A. C. W. Marsh, W. W. Marsh, C. W. Mosher, and R. C. Outcalt.

Q. Who acted as cashier?

A. There was not any.

Q. Who acted as president?

A. There was not any, just the same as any other firm would be. There were no officers in the firm.

Q. Did the firm do a general banking business in Lincoln?

A. Yes sir.

Q. Who accepted deposits and issued certificates for them?

A. Any member of the firm who happened to be at the counter.

Q. What members of the firm resided in Lincoln?

A. C. W. Mosher and R. C. Outcalt.

Q. Where did C. W. and W. W. Marsh reside?

A. I think at Sycamore and Dekalb, Illinois, one at one,

1587 and one at the other, I think.

Q. Neither of them ever lived in Lincoln?

A. Yes, they lived in Lincoln.

Q. When?

A. I don't know the dates.

Q. Did they at the time the firm you speak of was doing a banking business in Lincoln?

A. No.

Q. Then the business of the Bank was conducted by C. W. Mosher and yourself?

A. Yes sir.

Q. How were the drafts issued by the Bank signed?

A. Marsh Brothers Mosher & Company.

Q. How were the certificates of deposit made by the bank signed?

A. Same way.

Q. Who kept the books of the firm?

A. I don't know.

Q. Did you do any of the book work?

A. I think I did perhaps, in that early day. We had several different bookkeepers as the business increased.

Q. About how long did the firm continue to do a banking business?

A. I don't remember.

Q. Can you refresh your recollection by examining into any of the old books and papers?

A. I don't believe I could. I don't know anything about it. That is over twenty years ago.

1588 Q. I hand you ledger of Marsh Brothers Mosher & Company, which has been identified by the Notary as Exhibit "9," and ask if you can tell by it when this bank did business?

A. That says 1882 there. That is all I know about it.

Q. What time in 1882?

A. January, June, and July.

Q. You may state if that is the time the firm commenced doing business?

A. No, they commenced in 1878, October, 1878, I think it was.
Q. And they were doing business during the year 1882?
A. According to that they seemed to be.
Q. Do you know whether that is correct?
A. No, I don't.
Q. Do you mean to say that you don't know whether Marsh Brothers Mosher & Company were here during the year 1882?
A. No, I don't remember the dates.
Q. Can you tell by examining the book?
A. I cannot tell without making a system of these books, going over them, and give you the dates. If it is necessary I will come down tomorrow and do that.
Q. Can you tell from an inspection of the book I hand you?
A. No sir, I can't.
DEWEESE: In order to qualify the witness I ask this question: Is it not true that all you know about the date is what the book shows?
A. Yes.

1589 THOMAS:

Q. Now you may state when the firm of Marsh Brothers Mosher & Company ceased to do business, and when it commenced in the name of the Marsh National Bank?
A. I don't know.
Q. You may state when the firm of Marsh Brothers Mosher & Company ceased doing business as a banking firm?
A. I don't remember.
Q. You may state when the Marsh National Bank commenced doing business?
A. I don't remember the date exactly. I don't believe I could tell within a year.
Q. Can you tell by examining the books of these banks?
A. No sir, not to swear to it.
Q. Is that book I handed you first, identified as Exhibit "9," one of the books of Marsh Brothers Mosher & Company?
A. The title on the book says it was.
Q. I will ask you if you ever saw it before?
A. I don't think I ever did.
Q. Any of your figures or writing in that book?
A. I can't tell.
Q. Will you examine it and see?
A. You want a thorough examination of every page?
Q. No, just see if you can find some of it.
A. Just run it over and see whether it is?
Q. Just see if you find any of yours?
A. I don't see any of it.
Q. Did the firm of Marsh Brothers Mosher & Company keep a ledger?
A. I suppose so.
1590 Q. Do you know whether they did or not?
A. No sir.
Q. Did they keep a journal?

A. I suppose we did, but I don't know whether in that shape.
Q. Did you have any bookkeepers?
A. Yes sir.
Q. When the firm was first organized?
A. Yes, E. W. Mosher kept books, and S. K. Hale, I think he was with Marsh Brothers Mosher & Company, and I think W. A. Sharar. Those three worked there at different times.
Q. You remember the firm did keep a set of books, do you?
A. Yes, I remember that.
Q. What became of those books when the Marsh National Bank was organized?
A. I don't know.
Q. Have you ever seen those books since the Marsh National Bank was organized?
A. Not that I know of. I don't remember.
Q. Don't remember of ever having seen any of the books since the Marsh National Bank was organized, any of the books of Marsh Brothers Mosher & Company?
A. I don't remember of seeing them at any time.
Q. What do you say as to whether Exhibit,—do you know the handwriting of this book, Exhibit "9"?
A. I can only surmise.
Q. Who do you surmise?
A. I think S. K. Hale, no, not that one, I have no idea who wrote that; it may be Sharar.
1591 Q. Can you show some of Hale's handwriting on the book?
A. Yes, that is his, I think it is, on pages 148 and 149.
Q. Containing the account of Donnell, Lawson & Simpson, New York?
A. Yes.
Q. And pages 145, 144, 143, 142, 141, and 140, are those in the same handwriting?
A. They are not in the same handwriting at all.
Q. They are up to page 141?
A. I haven't looked at the pages.
Q. Look at the pages, is page 140 his writing?
A. I don't think it is.
Q. Is 141?
A. I don't think it is.
Q. And 142?
A. I don't think so.
Q. Whose is it?
A. I have no idea unless Sharar. I haven't seen his writing in twenty years.
Q. On page 144?
A. I believe that would be S. K. Hale's, but am not sure.
Q. 145 would be Hale's?
A. I think so.
Q. The same as to 146?
A. Yes.

Q. And 147?
A. It looks like it.
Q. 148 and 149 you have testified to?
A. Yes, it looks like his.
1592 Q. I hand you Exhibit "10," indicated as Ledger One of the Marsh National Bank, and ask you if you know what book that is?
A. No sir, I don't.
Q. You may examine it and see if you recognize it, calling your attention to page 617, Collection account Marsh Brothers Mosher & Company?
A. That is the ledger.
Q. Of the Marsh National Bank?
A. Nothing to show but the title of the book.
Q. Did you state a moment ago that the Marsh National Bank commenced doing business about June 1st, 1883?
A. No sir, I stated that it would be guess work to say.
Q. I now hand you now Exhibit "26," and ask you if you recognize the handwriting on that book?
A. No sir, I don't.
Q. I ask you if you recognize the handwriting or signature, "R. C. Outcalt, Secy," on page 37?
A. I recognize the signature.
Q. Whose signature is it?
A. Mine.
Q. I will ask you if that book contains the minutes of the meetings of the directors and stockholders?
A. It says so, but I would have to examine it to see.
Q. You may examine it and tell?
A. To answer that question I would have to go over it.
Q. Go over it?
A. It would take me an hour.
Q. Take your time? You may state what that book contains?
1593 A. I don't know.
Q. Have you read it?
A. No sir.
Q. Will you please read it and see?
A. I can't tell if I do.
Q. You can't tell what it contains after reading it?
A. No sir.
Q. It is written in English?
A. Yes.
Q. The writing is plain?
A. Yes, but you are asking me something I don't know how to do. I don't know whether these is minutes of all the meetings, or of particular meetings.
Q. Does it contain the minutes of any of the meetings?
A. It is headed that way, yes sir.
Q. Does it contain the minutes of any of the meetings?
A. I don't know.

Q. You may examine the book and see.
A. Yes sir, there is minutes of stockholders' meeting here.
Q. Of what date?
A. 25th day of June, 1883.
Q. Any minutes prior to that time of any meeting?
A. Are the by-laws part of the minutes?
Q. You have been in the banking business from 1870 to 1893, and you mean to say you do not know the difference between by-laws and minutes of meetings?
A. Yes I know the difference, but I didn't know but what you wanted that stated.
1594 Q. You may state what is contained in this book commencing on page 11, and extending from there and including pages 12, 13, 14, 15, 16, and 17?
A. I don't like to appear contrary about this thing, but I would have to read this over.
Q. Read it over? Do you mean to tell me Mr. Outcalt that you don't know what that contains?
A. Any man can see that; it is the by-laws of the Marsh National Bank.
Q. What is contained on page 18 of that book?
A. Copy of the charter.
Q. Of what bank?
A. Marsh National Bank.
Q. You may state what is contained on page 19, and extending over pages 20, 21, and 22?
A. Articles of association.
Q. Of what bank?
A. Marsh National Bank of Lincoln, Nebraska.
Q. Now you may state what is contained on pages 23 and 24?
A. Organization certificate.
Q. Of what?
A. Marsh National Bank, that is a copy of it.
Q. Does that give the names of the stockholders at the organization, together with the number of shares they each owned?
A. Yes, residence and number of shares.
1595 Q. Now what does page 25 contain?
A. Stockholders' meeting.
Q. Of what bank?
A. Marsh National Bank.
Q. You were present at that time?
A. I don't know. I probably was. It is not signed, but my name is down as having been present.
Q. That meeting was held at what time?
A. Held on the 25th day of June, 1883.
Q. I will ask what page 26 of that record contains?
A. That is a copy of the form of the oath of directors.
Q. Of the Marsh National Bank?
A. Marsh National Bank.
Q. And you may state what is contained on page 27 of that book?
A. That is a copy of the certificate of the officers and directors.

Q. Marsh National Bank?
A. Yes sir.
Q. Page 28 is a continuation of it?
A. Yes sir.
Q. Now you may state what is contained on page 29 of that book?
A. That is a directors' meeting.
Q. Of the Marsh National Bank?
A. Marsh National Bank, Lincoln.
Q. Held at what time?
A. Office of the bank, on the 25th of June, 1883.
Q. You were present at that time?
A. Yes.
1596 Q. Who signed the minutes as president?
A. C. W. Mosher as president, and W. A. Sharar, as secretary.
Q. What appears on page 30 of that book?
A. That is a copy of the names of the reserve agents.
Q. Of the Marsh National Bank?
A. Marsh National Bank.
Q. What appears on page 31?
A. That is a stockholders' meeting.
Q. Of the Marsh National Bank?
A. Marsh National Bank.
Q. Held at what time?
A. Dated January 8, 1884.
Q. Who signed those minutes as president?
A. C. W. Mosher, president.
Q. As secretary?
A. W. A. Sharar as secretary.
Q. I will ask you if there is anything else contained on page 31?
A. It says Directors' meeting.
Q. For what date?
A. 8th of January, 1884.
Q. That is of the Marsh National Bank?
A. Yes sir.
Q. And the minutes of that meeting continue on page 32?
A. Yes.
Q. And who signed the minutes of that meeting as president?
A. C. W. Mosher as president.
Q. As secretary?
A. W. A. Sharar as secretary.
1597 Q. Does anything else appear on that page?
A. Directors' meeting, February 14, 1884.
Q. Directors of the Marsh National Bank?
A. Yes sir.
Q. Who signed that as president?
A. C. W. Mosher.
Q. Who as secretary?
A. R. C. Outcalt.
Q. That is yourself?
A. Yes sir.

Q. What appears on page 33 of that book?
A. Directors' meeting.
Q. Of the Marsh National Bank?
A. Yes sir.
Q. Of what date?
A. February 20, 1884.
Q. Who signs that as president?
A. C. W. Mosher.
Q. As secretary?
A. R. C. Outcalt, as secretary.
Q. State what appears on page 34 of that book?
A. That is a copy of the authority to change the name of the bank from the treasury department.
Q. That is the authority issued by the Comptroller of the Currency?
A. Yes sir.
1598 Q. Does that extend to a part of page 35?
A. Yes sir.
Q. And what else is contained on page 35?
A. Stockholders' meeting, May 23rd, no year. Must have been the same year.
Q. Signed by what officers?
A. C. W. Mosher President, and R. C. Outcalt, secretary; that is of the Board of Directors, not of the bank.
Q. What appears on page 36?
A. Special meeting of the directors.
Q. Of the Marsh National Bank?
A. Marsh National Bank, May 5, 1884.
Q. Who signed those minutes?
A. C. W. Mosher, president, and R. C. Outcalt, secretary.
Q. Mr. Mosher was president, and you were secretary of the Board of Directors at that time?
A. Yes sir.
Q. Prior to the time you were Secretary, was W. A. Sharar secretary, and one of the Board of Directors?
A. Not of that bank, yes, he acted as secretary of the meeting.
Q. What else appears on page 36?
1599 A. Special meeting, May 23rd.
Q. That is continued on page 37?
A. Yes sir.
Q. Were the minutes of that meeting signed, and if so, how?
A. C. W. Mosher, president, and R. C. Outcalt secretary.
Q. Those are the meetings of the Marsh National Bank, are they not?
A. Yes sir.
Q. You may state what is contained on page 38 of that record?
A. Copy of receipt for U. S. bonds.
Q. You may state what is contained on page 39 of that book?
A. A copy of the authority to increase the capital stock.
Q. Of what bank?
A. Capital National Bank. That is after it had changed.

Q. The minutes of the meeting on the bottom of page 36 and top of 37 are the last of the Marsh National Bank prior to the time it changed its name to Capital National Bank?

A. It seems so.

Q. What was done at that meeting?

1600 Q. Is that the meeting in which the directors decided to change the name of the bank from Marsh National Bank to Capital National Bank?

A. The records show it is.

Q. You signed the minutes of that meeting?

A. Yes sir.

Q. Were the minutes kept correctly?

A. I suppose, I didn't write them up.

Q. You signed them?

A. Yes.

Q. Did you know that the minutes stated correctly the transactions of the Board?

A. I have forgotten now.

Q. Did you know at the time you signed those as secretary whether those minutes correctly stated the proceedings at that time?

A. I suppose they did. It is too far back for me to remember.

Q. Would you have signed it if it had not?

A. I might have signed it without reading it over.

Q. Do you know as a matter of fact that the bank did change its name about that time, and was thereafter known as the Capital National Bank?

A. Yes.

Q. And you have no reason to doubt that this meeting I have referred to was the one in which it was voted to change the name, and that the minutes correctly state the actions of the Board at that time?

1601 A. No I have no reason to doubt it.

Q. You may state what is contained on page 39?

A. Authority to increase the capital.

Q. Capital stock of what Bank?

A. Capital stock of the Capital National Bank.

Q. At that time did the Bank assume the name of Capital National Bank?

A. So it states here.

Q. Is that the fact?

A. Yes.

Q. What is contained on the upper half of page 40 of this book?

A. Stockholders' meeting.

Q. Of what bank?

A. It don't state the name of the bank here at all.

Q. By whom are the minutes signed?

A. C. W. Mosher, president, and R. C. Outcalt, Secretary.

Q. What else is contained on page 40?

A. Directors' meeting January 1885, the second Tuesday in January.

Q. What bank?

A. Don't state the name of the Bank.
Q. Were Stewart, Holmes, Yates, and Thompson stockholders of the Marsh National Bank?
1602 A. Why, I don't know whether they were or not, unless I could take and look these records over again.
Q. Referring to minutes recorded on page 40, as to whether those are the minutes of the Marsh National Bank or Capital National Bank, you may examine the minutes and names of the directors recited as being present at that time, and state whether that is the minutes of the Capital National Bank or Marsh National Bank?
A. That is the minutes of the Capital National Bank.
Q. Is the same true of both meetings on that page 40?
A. One is stockholders' and one directors'.
Q. Are they both of the Capital National Bank?
A. Yes.
Q. Are they both signed by Mr. Mosher as president, and yourself as secretary?
A. Yes sir.
Q. What is contained on page 41?
A. Directors' meeting.
Q. Of the Capital National Bank?
A. Yes, held on the second Tuesday in July, 1885, and also one held the second Tuesday in January, 1886. That is a stockholders' meeting.
Q. The stockholders' meeting is signed by C. W. Mosher as president and yourself as secretary?
A. Yes sir.
Q. And the other meeting by Mr. Mosher as president?
A. Yes.
1603 Q. What is contained on page 42?
A. Directors' meeting.
Q. What bank?
A. It don't state.
Q. You may state then?
A. It is the Capital National Bank, second Tuesday in January, 1886.
Q. Signed by who?
A. C. W. Mosher president, and R. C. Outcalt secretary.
Q. Is that not signed by your name as cashier?
A. That is a mistake, I had been in the habit of signing that way.
Q. Does that also contain meeting of stockholders?
A. Stockholders' meeting.
Q. Of what date?
A. June 2, 1886.
Q. Signed by who?
A. C. W. Mosher president, and R. C. Outcalt, secretary.
Q. What is contained on page 43?
A. Special meeting of directors.
Q. Of the Capital National Bank?
A. Yes sir.
Q. Held when?

A. June 21, 1886.
Q. Signed by who?
A. C. W. Mosher president, and R. C. Outcalt, secretary.
Q. What is contained on page 44 of that book?
A. Authority to change the bonds, authority from the
1604 treasury department, copy of the authority.
Q. For the Capital National Bank?
A. Yes.
Q. The remainder of that book up to and including pages 67, contain- the minutes of the several meetings of the directors and stockholders of the Capital National Bank, and are each signed by C. W. Mosher as president and yourself as secretary?
A. Yes, except pages 44, 45, and 46.
Q. What do these pages contain?
A. Authority to change bonds.
Q. Page 45?
A. Receipt for U. S. bonds from the treasurer.
Q. And 46?
A. Authority to increase capital, a copy, a record of the authority.
Q. I now hand you Exhibit "107" which is now identified by the Notary, which is pinned to page 69 of this book, and ask you if you can identify that?
A. I can't tell anything about that. I didn't sign it.
Q. Can you read it?
A. Yes, it is signed by C. W. Mosher president.
Q. You may read it over and see what it is?
A. It is a special meeting of the directors to turn that bank over to the Comptroller of the Currency.
Q. What bank, Capital National Bank?
1605 A. Capital National Bank.
Q. What date is that?
A. January 22, 1893; that must have been Sunday.
Q. Now were there any minutes that you know of that were not kept in this book?
A. I don't remember.
Q. These minutes, so far as they go, are correctly stated?
A. So far as I know.

Mr. THOMAS: We now offer in evidence the following pages of Exhibit "26," which has been identified by Mr. Outcalt, namely:— commencing at page 11, and continuing to and including page 67, and intermediate pages.

Mr. THOMAS: We now offer in evidence Exhibit "107," identified by the witness Mr. Outcalt.

Q. Now, Mr. Outcalt we hand you the following books of the Capital National Bank, identified by the Notary as Exhibits 1 to 64 inclusive, and from 94 to 108, inclusive, and ask you to state if those are the books, records, and documents of the Capital National Bank, the Marsh National Bank, and Marsh Brothers, Mosher & Company?
1606–1611 A. Yes, those are the books.
Q. Those are the books in which the business of

those several banks was kept and entered during the existence of the several banks referred to?

A. Yes, those are the same books.

Q. And all of the transactions of these several banks is contained in these various books you have identified?

A. Well, if you have a book missing, the transaction would not be in there.

Q. All you have identified were used by the bank in the regular and ordinary transaction of its business?

A. Yes.

Cross-examination.

Examined by Mr. DEWEESE:

Q. May there have been some transactions by some of the officers of the bank during the period of the existence of the Capital National Bank which does not appear in any of these books?

A. There might have been.

1612 MAY 19, 1902—Two o'clock p. m.

S. K. HALE, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:—

Q. You may state your name, age, and place of residence?

A. S. K. Hale; I am getting pretty old; I live in the city of Lincoln, and will be 54 years old in November. I live at Number 1519 "O" street, Lincoln, Nebraska.

Q. How long have you resided in Lincoln?

A. Oh, I have been in Lincoln anywhere from 26 to 28 years. I don't remember just when I did come here; twenty-five years anyway.

Q. You may state what in general has been your occupation during your residence in Lincoln?

A. Well, I have been engaged in several different kinds of occupations. When I first came I was with A. D. Marshall & Company. They were in the coal and wood business and handled some grain. I kept their books one winter. Afterwards I took the business of F. H. Halsey of Atchison, Kansas, and I took care of his business there for six or eight months. He was in the same business, but handled grain largely. And from there I was connected with T. W. Lowrey, I think those are the initials, Tom Lowrey. I kept his books about six months, I think it was. Then, the next place I went was to what they called the collection office of the Marsh Harvester people down here, (indicating) and it
1613 eventually drifted into the Capital National Bank; that is where it started; that was the foundation of it.

Q. About when was it that you entered the employ of the Marsh Harvester Company. I believe you stated that was the name?

A. I don't exactly remember how long I was there, but I should

say that it was anyway ten or 12 years; I think the bank failed in 1892.

Q. 1893.

A. 1893, well, you might say twelve years, I guess. I know I was there that long.

Q. What was the name of the firm in whose employ you first entered?

A. Marsh Brothers, Mosher & Company, if I remember correctly, was the name when I first went with them.

Q. And in what business were they engaged?

A. Well, they were engaged in the Banking business to some extent, and largely collections. The heavy part of the business was collections for the Marsh Harvester Company, which was running all over this country at that time. Of course when I went with them, they had simply only started, and their banking business was somewhat light outside of the collections.

Q. How long did this firm of Marsh Brothers, Mosher & Company continue to exist under that name?

A. That I am unable to tell you. Let me think a minute. I won't be positive, but it does occur to me that there were two changes in the name of the bank before it eventually became the Capital National Bank, and the other one,—it has slipped my memory. I don't remember the style of the firm now.

1614 Q. To refresh your recollection, I ask you if it was the Marsh National Bank?

A. Yes. First Marsh Brothers, Mosher & Company,——

Q. How long did it continue to operate under that name?

A. Well, according to this book, it would be June, 30th, 1883.

Q. What book is that you refer to?

A. This is general Ledger No. 1, Marsh Brothers, Mosher & Company.

Q. And identified by the reporter as Exhibit "9"?

A. Yes sir, that is what he says there.

Q. In what name did it operate after that?

A. After that, the Marsh National Bank.

Q. When did it commence to go under that name?

A. It starts here according to dates, July 2, 1883.

Q. Now, when the business changed from Marsh Brothers, Mosher & Company to the Marsh National Bank, you may state if a new set of books was opened?

A. Yes sir, it seems to be a new book here.

Q. I will ask you if Exhibit Number "10," being Ledger Number 1 of the Marsh National Bank is the new ledger that was opened up at that time?

A. Yes sir.

Q. Are both the ledgers of Marsh Brothres, Mosher & Company, and the Marsh National Bank, to which I have referred, in your handwriting, and were they written by you?

A. Part of this I know, these are my figures here, (indicating).

1615 DEWEESE: In what book is that?

A. In the ledger of Marsh Brothers, Mosher & Company.

THOMAS:

Q. I will ask you to state Mr. Hale where the balances that appear in red ink at the commencement of each new account in the Marsh National Bank ledger were taken from, if anywhere, if you know?

A. The balance there is Donnell, Lawson, & Simpson, of New York. It was taken from General Ledger Marsh Brothers, Mosher & Company Number 1,

Q. And transferred to what book?

A. Transferred to Ledger 1, Marsh National Bank, on page 147,

Q. Now you may state what the figures in red ink on the first line from the top on page 147 of the Marsh National Bank Ledger, "149," refer to?

A. They refer to the page where this balance was taken.

Q. They refer to the page of Marsh Brothers, Mosher & Company's Ledger, from which it was transferred to the ledger of the Marsh National Bank?

A. Yes sir.

Q. And referring to the ledger of Marsh Brothers, Mosher & Company, on page 149, on the last line but one of that page, where the following appears:—"Balance, 147, 7301.32," you may state what the figures 147 referred to?

A. They refer to the page on the Marsh National Bank Ledger Number One.

Q. Do you find other accounts that have been transferred from the Marsh Brothers Mosher & Company Ledger to the Marsh National Bank Ledger?

1616 A. Yes sir, I have before me the Commercial National Bank of Chicago, which is transferred in the same way as the other.

Q. Do you find any other accounts that were transferred in this same manner?

A. Yes sir.

Q. You may examine the two books, and state, if you can, whether accounts generally were transferred from Marsh Brothers Mosher & Company Ledger to the Ledger of the Marsh National Bank?

A. Yes, those that I have examined here have been transferred from Marsh Brothers Mosher & Company to the Marsh National Bank.

Q. The transfers are in your handwriting?

A. Yes sir, those that I have examined so far.

Q. Are these ledgers some of the books that were kept by you while you were in the employ of Marsh Brothers Mosher & Company and the Marsh National Bank?

A. They are.

Q. You may state whether these transfers were made at or about the time the Marsh Brothers Mosher & Company formally became the Marsh National Bank?

A. Yes, I should say they were.

Q. Now you may state if the assets, liabilities, and accounts of Marsh Brothers Mosher & Company were transferred to the books of the Marsh National Bank, and became the assets and liabilities of the Marsh National Bank?

1617 A. They were.

Q. I now call your attention to the account indicated as Stock & Bond Account, found on page 7 of Exhibit "10," being Ledger 1 of the Marsh National Bank, and ask you if you made the transfer of this account to this book from Ledger 1, Marsh Brothers, Mosher & Company, page 639, being Exhibit "9"?

A. That is my writing, yes sir.

Q. Did you make the transfer from the one book to the other indicated?

A. I evidently did. Those are my figures.

Q. Is the balance on the first line of page 7, Ledger 1, Marsh National Bank, which reads as follows:—"July 2, Balance, 540," in the same condition as when you originally made it?

A. No sir, it certainly is not.

Q. You may state what, if anything, has occurred?

A. Why, there seems to be $30,000 off of it.

Q. You may state how that was taken off?

A. That I can't do.

Q. I will ask you to state in what physical manner it was taken off?

A. It has been done by an eraser, you know, scratched off.

Q. You may examine the account in the same Ledger 1 of the Marsh National Bank, known as Bills Receivable, and found on page 15, and state if there has been any change in the balance brought forward on the top of that page since you made it?

1618 A. Yes sir, there has been a change made.

Q. You may indicate or state what change has been made?

A. There has been an addition there of $30,000.

Q. You may state how that change was made?

A. The change has been made by erasing the figure 4, and inserting the figure 7.

Q. Was that change made by you, Mr. Hale?

A. Well, that is something I could not be absolutely positive of.

Q. I hand you Exhibit Number "1," being Journal of the Marsh National Bank, and ask you to examine this book and state if you find in it any entry, the effect of which would be to eliminate or take from the Stock & Bond Account the sum of $30,000 just referred to?

A. Stock & Bond account does not appear here on this date anywhere, I see nothing.

Q. I will ask you to state from where, if anywhere, the items that appear on this book known as Ledger 1 of the Marsh National Bank are taken?

A. This is posted from the Journal onto the Ledger.

Q. Are all the entries that appear on the ledger copied from entries that are made on the journal?

A. Yes sir, all that are in my writing are.

Q. State if any entries can properly be made on the ledger
1619 that are not taken from the corresponding journal on that date?

A. No sir.

Q. Then you may state if the account of Stock & Bonds, or any other accounts, could be increased or diminished unless there was an entry to that effect in the journal; by that I mean properly increased or diminished?

A. Well, no, I would say not, properly.

Q. During the time that you were keeping these books, you may state if you made any entries on the ledger, or made any changes in the figures on the ledger that were not justified or indicated by corresponding entries on the journal?

A. No sir, not to my knowledge.

Q. Do you find anything upon the journal shown you that would justfy the change of the balance of the Bills Receivable account; taken from the Ledger of Marsh Brothers Mosher & Company at $248,029.33, and transferred to the Marsh National Bank at $278,-029.33?

1620 A. I do not.

Q. Now, I will ask you whether or not you made the change in Bills Receivable Account by which this was increased the sum of $30,000 in transferring it from the Ledger of Marsh Brothers Mosher & Company to the Ledger of the Marsh National Bank?

A. No sir, I don't think I did.

Q. I hand you now, Mr. Hale, Exhibit "18," and ask you to state if that is one of the books of the Bank kept by you while you were in its employ?

A. Yes sir, it is.

Q. What is that book known as?

A. That is known as a daily balance book, of the Marsh National Bank it says here; the cover is off.

Q. You may state if you were in the employ of the Marsh National Bank during the entire time it existed and did Business in that name?

A. Of the Marsh National Bank?

Q. Yes.

A. Yes sir.

Q. You may state if you were in the employ of the Capital National Bank during all of the time of its existence?

A. I was.

Q. Were you in its employ at the date of its failure?

A. I was.

Q. State generally what books you kept during the time you were in the empoy of these three banking firms, or corporations?

A. I kept what was termed the general books of the bank; this daily balance book, cash journal, ledger, and balance book.

1621 Q. Are these the books you have referred to and examined during your examination?

A. Those are part of them.

Q. Is the book, Exhibit "18," I hand you one of the books of the bank which you kept?

A. Yes sir.

Q. I will ask you to examine this book, commencing on page under date July 2, 1883, and state if you find any changes or alterations in any of the figures since the entries therein were made by you?

A. I do.

Q. You may note some of those changes?

A. There is this here in stock and bond account.

Q. Under what date?

A. July 2, 1883.

Q. What is the nature of the change?

A. There seems to be a change of $30,000, taken from stock and bond account and added to Bills Receivable account.

Q. In what manner was that change effected?

A. Simply taken from one account and added to the other.

Q. Do you mean erased or scratched out?

A. Yes, erased from the stock and bond account, and the original figures in Bills Receivable erased and $30,000 added to it.

1622 Q. Thereby increasing the Bills Receivable $30,000?

A. Yes sir.

Q. The Bills Receivable account on that date is indicated in what manner?

A. "B-R."

Q. You may follow these two accounts, stock and bond account, and bills receivable account, and note during how many days these changes occur?

A. From July 2, 1883, to July 27, 1883.

Q. Inclusive?

A. Inclusive, yes sir.

Q. Now I will ask you to examine the account of Bills Receivable on this same book, and state during how many days these changes are made in that account?

A. Twenty-two days, if I count correctly, and I guess I do. I can give it in another way, from July 2, 1883, to July 27, 1883, inclusive.

* * * * * * *

1623 Q. Did the Bank keep a separate book, in which it entered items of interest paid by the Bank?

A. Yes sir.

Q. What kind of a book was that?

* * * * * * *

1624 Q. Was this interest paid book similiar to the book Exhibit "32," which I hand you?

1625 A. Yes, similiar to this, possibly just like it, as I remember now.

* * * * * * *

Q. Would the interest paid book properly contain any entries excepting those that you have indicated, namely for disbursements on account of interest or exchange?

A. Yes, it would contain those entries.

1626–1646 Q. Would it properly contain other entries than those specified?

A. Why, I hardly think so. If I had the book before me I could very soon tell.

Q. Could any other entries be made on that book than for interest paid for the bank, regularly, and properly?

A. Why, I don't think any entry could be properly made only for an expenditure of the bank in some way, you know, either interest paid on deposits, or something like that.

Q. And would those entries be debit or credit entries?

A. They would be debit.

Q. These would all be debit entries?

A. Yes sir.

Q. Could a credit entry be properly made to this account, or on this book?

A. They could not.

* * * * * * *

1647–1761 Q. Now, Mr. Hale, I hand you a bunch of certificates purporting to be certificates of deposit of the Capital National Bank, being 777 in number, and which the notary identifies as Exhibits 147 to 923½, inclusive, and ask you to examine them, and state if you recognize the handwriting on each of those certificates?

A. I do, yes sir.

Q. You say you recognize the handwriting on each of those certificates?

A. I do.

Q. You may state if those are certificates that were issued by the Capital National Bank?

A. They are, yes sir.

* * * * * * *

Endorsed on cover: File Nos. 20,139; 20,140; 20,141; 20,142. Term Nos. 230, 231, 232, and 233. Charles E. Yates *et al.*, plaintiffs in error, *vs.* Jones National Bank. Charles E. Yates *et al.*, plaintiffs in error, *vs.* Utica Bank. Charles E. Yates *et al.*, plaintiffs in error, *vs.* Thomas Bailey. Charles E. Yates *et al.*, plaintiffs in error, *vs.* Bank of Staplehurst. Bill of Exceptions. Filed March 20th, 1906. File Nos. 20,139, &c.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 231.

CHARLES E. YATES, LOUISA HAMER, ADM'X OF ELIS P. HAMER, DECEASED, CHARLES W. MOSHER, ET AL., PLAINTIFFS IN ERROR,

vs.

UTICA BANK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MARCH 20, 1906.

(20,140.)

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1 No. 13031.

CHARLES E. YATES, LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased,
v.
THE UTICA BANK.

RICHARD C. OUTCALT
v.
THE UTICA BANK.

CHAS. W. MOSHER
v.
THE UTICA BANK.

Pleas before the Supreme Court of the State of Nebraska, at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 2nd day of January, A. D. 1906.

Present: Hon. Samuel H. Sedgwick, Chief Justice; Hon. John B. Barnes, Judge; Hon. Charles B. Letton, Judge.

Attest:
H. C. LINDSAY, *Clerk.*

Be it remembered, that on the 28th day of November, A. D., 1902, there was filed in the office of the Clerk of said Supreme Court a certain Petition in Error of Charles E. Yates in the words and figures following to-wit:

2 In the Supreme Court of the State of Nebraska.

CHARLES E. YATES, Plaintiff in Error,
vs.
THE UTICA BANK, Defendant in Error.

The plaintiff complains of the defendant, for that on the 21st day of July, 1902, the defendant herein recovered a judgment against the plaintiff herein, in the district court of Seward county, Nebraska, for the sum of $8,292.92 and costs amounting to the sum of $—. That subsequently, and on the 22nd day of October, 1902, at the same term of said court, an order was made by said court requiring the said defendant in error to remit a portion of said judgment, as the same was excessive to the extent of $181.63; and that said defendant in error filed a remittitur in obedience to the order of said court, and judgment was then formally entered in favor of the defendant in error and against this plaintiff in error, in the sum of $8,111.29 in said action pending in said court, wherein the defendant herein was plaintiff and the plaintiff herein was defendant.

A transcript of said judgment, pleadings and proceedings in said cause, together with the bill of exceptions containing all of the evidence introduced, is filed herewith.

The plaintiff alleges that there is error in said proceedings and judgment, in this:

1st. The court erred in overruling the objections of this defendant below to the introduction of any testimony, at the time the
3 same was offered on the trial of said cause, as appears by the bill of exceptions in said cause, page 8; said objection being based upon the character of the case as made in the plaintiff's petition, it being strictly and specifically alleged that the defendant below in the several acts of misconduct, negligence, misfeasance and fraud of which the plaintiff complained, acted in his official capacity as a director of the Capital National Bank; and that acting as such director it became and was his duty under the law, as well as the by-laws of said national bank, as is alleged, to do various and sundry things which he neglected to do, and which he purposely omitted to do; and that in his official capacity, and acting as such director, he did various things, as is specifically alleged, in violation of his duties and obligations as a director of said bank, under the law and the by-laws of said bank, thereby causing heavy losses to the said bank, which caused its insolvency, and which it is alleged resulted in a damage to the plaintiff below; whereas, if said allegations of misfeasance, nonfeasance and fraud of said defendant below in his capacity as a director of said national bank were true, and any damage caused by the facts alleged would be a direct damage to said bank, and any recovery therefor would be an asset of said bank to be ratably distributed among the creditors and stockholders of said bank; and such damages were recoverable alone by said bank, or the receiver of said bank, and not by the plaintiff below in its individual capacity against the defendant below.

2nd. The court erred in rendering judgment against the defendant below, for the reason that under the issues joined and the evidence introduced, the plaintiff below was not entitled under
4 the law to recover a judgment for itself individually against the defendant below in his individual capacity or otherwise; and for the reason that whatever damage there was, if any, caused by the negligence, misconduct and fraud of the defendant below in his capacity as a director in the Capital national bank, was recoverable alone by said bank or the receiver of said bank, and not by the plaintiff below.

3rd. The court erred in refusing to give the first paragraph of the instructions requested by this plaintiff in error, defendant below, for the court to direct the jury to return a verdict in favor of the defendant below, being numbered 1, and found in the transcript on page 69.

4th. The court erred in giving the eleventh paragraph of the instructions given by the court, numbered 11th, found on page 52 of the transcript.

5th. The court erred in giving to the jury the sixteenth paragraph of its charge to the jury, numbered 16th, where he undertakes to

define the actionable negligence of a director of the bank in not discovering the embezzlement of funds by the president of the bank or of the cashier, thus fixing a liability not recognized by the law fixing and defining the duties of directors of national banks, and in direct violation of the principal and requirements specified in sections 5239 and other sections of the National Banking Act.

6th. The court erred in giving the seventeenth paragraph of its instructions to the jury, numbered 17th, for the same reasons as set forth in the assignment of errors concerning the giving of the sixteenth paragraph above mentioned.

5 7th. The court erred in refusing to give the sixth paragraph of the instructions requested by the defendant below, numbered 6th, wherein the duties and liabilities of directors of national banks are defined in accordance with the provisions of the National Banking Act.

8th. The court erred in each one of its instructions to the jury in the construction and application of the duties and liabilities of directors of national banks under the national banking act, as shown by paragraphs of the charge of the court to the jury numbered 9th, 10th, 11th, 16th and 17th.

9th. The court erred in entering judgment against the defendant Charles E. Yates, for the reason that the plaintiff's cause of action, if it ever had any against him, did not accrue to — within five years prior to the commencement of said action; and said action was barred by the statute of limitations as against said defendant.

10th. The court erred in overruling the motion for a new trial.

The plaintiff therefore prays that said judgment may be reversed and said cause of action dismissed, and that said plaintiff in error go hence without costs.

J. W. DEWEESE,
Att'y for Pl'ff in Error.

Endorsed: 13031. Charles E. Yates, *et al., vs.* The Utica Bank. Petition in error. Charles E. Yates. Supreme Court of Nebraska. Filed Nov. 28 1902. Lee Herdman Clerk.

6 And on the same day there was filed in the office of the Clerk of said Supreme Court, a certain Petition in Error of Louisa Hamer, Administratrix of the Estate of Ellis P. Hamer, deceased, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased, Plaintiff in Error,

vs.

THE UTICA BANK, Defendant in Error,

The plaintiff complains of the defendant, for that on the 21st day of July, 1902, the defendant herein recovered a judgment against the plaintiff herein, in the district court of Seward county,

Nebraska, for the sum of $8,292.92 and costs amounting to the sum of $—. That subsequently, and on the 22nd day of October, 1902, at the same term of said court, an order was made by said court requiring the said defendant in error to remit a portion of said judgment, as the same was excessive to the extent of $181.63; and that said defendant in error filed a remittitur in obedience to the order of said court, and judgment was then formally entered in favor of the defendant in error and against this plaintiff in error, in the sum of $8,111.29 in said action pending in said court, wherein defendant herein was plaintiff and the plaintiff herein was defendant.

7 A transcript of said judgment, pleadings and proceedings in said cause, together with the bill of exceptions containing all of the evidence introduced, is filed herewith.

The plaintiff alleges that there is error in said proceedings and judgment, in this:

1st. The court erred in overruling the objections of this defendant below to the introduction of any testimony, at the time the same was offered on the trial of said cause, as appears by the bill of exceptions in said cause, page 8; said objection being based upon the character of the case as made in the plaintiff's petition, it being strictly and specifically alleged that the defendant below in the several acts of misconduct, negligence, misfeasance and fraud of which the plaintiff complained, acted in his official capacity as a director of the Capital National Bank; and that acting as such director it became and was his duty under the law, as well as the by-laws of said National Bank, as is alleged, to do various and sundry things which he neglected to do, and which he purposely omitted to do; and that in his official capacity, and acting as such director, he did various things, as is specifically alleged, in violation of his duties and obligations as a director of said bank, under the law and the by-laws of said bank, thereby causing heavy losses to the said bank, which caused its insolvency, and which it is alleged resulted in a damage to the plaintiff below; whereas, if said allegations of misfeasance, nonfeasance and fraud of said defendant below in his capacity as a director of said national bank were true, and any damage caused by the facts alleged would be a direct damage to said bank, and any recovery therefor would be an asset of said bank to be ratably distributed among the creditors and

8 stockholders of said bank; and such damages were recoverable alone by said bank, or the receiver of said bank, and not by the plaintiff below in its individual capacity against the defendant below.

2nd. The court erred in rendering judgment against the defendant below, for the reason that under the issues joined and the evidence introduced, the plaintiff below was not entitled under the law to recover a judgment for itself individually against the defendant below in his individual capacity or otherwise; and for the reason that whatever damage there was, if any, caused by the negligence, misconduct and fraud of the defendant below in his capacity as a director in the Capital National Bank, was recoverable

alone by said Bank or the Receiver of said Bank, and not by the plaintiff below.

3rd. The court erred in refusing to give the first paragraph of the instructions requested by this plaintiff in error, defendant below, for the court to direct the jury to return a verdict in favor of the defendant below, being numbered 1, and found in the transcript on page 69.

4th. The court erred in giving the eleventh paragraph of the instructions given by the court, numbered 11th, found on page 52 of the transcript.

5th. The court erred in giving to the jury the sixteenth paragraph of its charge to the jury, numbered 16th, where he undertakes to define the actionable negligence of a director of the bank in not discovering the embezzlement of funds by the president of the bank or of the cashier, thus fixing a liability not recognized by the law fixing and defining the duties of directors of national banks, and in direct violation of the principle and requirements specified in sections 5239 and other sections of the National Banking Act.

9 6th. The court erred in giving the seventeenth paragraph of its instructions to the jury, numbered 17th, for the same reasons as set forth in the assignments of errors concerning the giving of the sixteenth paragraph above mentioned.

7th. The court erred in refusing to give the sixth paragraph of the instructions requested by the defendant below, numbered 6th, wherein the duties and liabilities of directors of national banks are defined in accordance with the provisions of the National Banking Act.

8th. The court erred in each one of its instructions to the jury in the construction and application of the duties and liabilities of directors of national banks under the national banking act, as shown by paragraphs of the charge of the court to the jury numbered 9th, 10th, 11th, 16th and 17th.

9th. The court erred in entering judgment against the defendant Louisa Hamer, Administratrix of the Estate of Ellis P. Hamer, deceased, for the reason that the plaintiff's cause of action, if it ever had any against plaintiff in error, did not accrue to within five years prior to the commencement of said action; and said action was barred by the statute of limitations as against said defendant.

10th. The court erred in overruling the motion for a new trial.

The plaintiff therefore prays that said judgment may be reversed and said cause of action dismissed, and that said plaintiff in error go hence without costs.

J. W. DEWEESE,
Att'y for Pl'ff in Error.

10–13 Endorsed: 13031. Charles E. Yates, *et al. vs.* The Utica Bank. Petition in error of Louisa Hamer, Adm'x. Supreme Court of Nebraska Filed Nov. 28 1902 Lee Herdman, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain transcript in the words and figures following, to-wit:

District Court of Seward County, Nebraska.

Please before the district court of the fifth Judicial District of Nebraska in and for the County of Seward, at a term thereof begun and holden in the City of Seward, in said County and State, on the 19th day of May One Thousand Nine Hundred and Two.

Present: Honorable S. H. Sornborger, Judge J. M. Calder, Clerk.

THE UTICA BANK, Plaintiff,

v.

CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STEWART, RICHARD C. OUTCALT, and ROLLO O. PHILLIPS, Defendants.

* * * * * * *

14 And afterwards, on the 16th day of March 1899, there was filed in the office of said Clerk a certain Amended Petition in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THE UTICA BANK, Plaintiff,

vs.

CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STUART, RICHARD C. OUTCALT, and ROLLO O. PHILLIPS, Defendants.

Amended Petition.

The plaintiff for its amended petition complains of the defendants and allege- that the plaintiff is a corporation duly organized and doing a general banking business, with its principal place of business at Utica, Nebraska.

15 That on, prior and subsequent to the 9th day of December, 1892, and at the several times hereinafter mentioned, the defendants acted as the directors and officers of the Capital National Bank; that they acted as such officers and directors and as such *and* the control and management thereof and which said Capital National Bank was a corporation duly organized and doing a general banking business in the city of Lincoln, Nebraska.

That acting as such officers and directors of said bank, it became and was the duty of the defendants and each of them under the law as well as the by-laws of said bank to actively and actually manage and superintend the business of the same, to examine the books of

said bank including loans and discounts, to examine the loans made, to whom made, the security therefor, and when due; to see that the general condition of said bank corresponded with its books, to see that the resources and liabilities of said Bank corresponded with the books of said Bank, to see that all notes and bills receivable held by said Bank and entered upon its books and in its statements as valuable assets were in fact good valuable and collectible, and see that all such as were worthless or of little or no value were charged off from the assets of said Bank and not included in its statements, to see that the valuable effects, assets, and other matters including the cash on hand and in other banks or depositories agreed with the books of said Bank.

That the defendants and each of them failed to perform the aforesaid duties and each and all of them imposed upon them by law, and by the by-laws of said bank, and by reason of such failing
16 large loans were made by the bank to insolvent persons upon inadequate or no security, and to its officers, and to those who were relatives and favorites of the defendants as officers or acting officers of the Bank.

That the books of said Bank were out of balance, that they allowed and permitted forced balance to be made and carried on the bank books, the deposits account was falsified, being greatly understated, the real estate, bills receivable, and deposit account each being largely inflated; that they permitted to be carried on the books of the bank and permitted and caused to be published statements and advertisements, wherein they included as valuable assets of the bank large and numerous notes and bills receivable from persons as due and owing to the Bank from persons who were worthless and irresponsible, and also included in their statements of the resources and liabilities of said Bank, and also upon its books as good and valuable, numerous notes, bills receivable and other resources in large amounts that were either wholly worthless or of little or no value, and also permitted large amount of notes, bills receivable and other items, due the bank to remain past or overdue without taking steps to collect or secure the same, whereby the same was lost to the bank and became and were entirely worthless; and they permitted and continued from time to time to carry such worthless and valueless notes, bills receivable, and other assets upon the books of said bank as a part of its valuable and available assets when they knew, or should by proper diligence and examination have known the same to be wholly worthless, and of no value, and from time to time they published, permitted, allowed and caused to be published to the public and informed and
17 represented to the plaintiff in the numerous statements made by them to plaintiff that such notes, bills receivable, and other worthless assets were good and collectible and part of the valuable resources and effects of said bank when in truth and in fact they knew and were in duty bound to know said statements and each and all of them to be false and utterly untrue; that the resources of said Bank were largely inflated and the liabilities thereof largely shrunken, and the published statements and advertisements and the books of the Bank did not show its true condition in this that the

Bank by its books and the published statements and advertisements showed that it was in good sound financial condition when it was in truth and in fact in an insolvent condition, and was and had been in an insolvent condition since and prior to December 9th, 1892, and that such insolvency resulted from the careless and negligent manner in which the defendants acting as such directors and officers managed and superintended the Bank and its business, and all of which facts and circumstances the defendants, and each of them, had full knowledge, and it was the duty of each of them under the law to so know and inform themselves regarding the true condition of said Bank.

That after said Bank became insolvent as aforesaid the defendants made, caused, allowed and permitted to be made, statements to the plaintiff and the public showing said Bank to be solvent, its capital stock unimpaired, and a surplus on hand, and so continued to publish, cause, allow and permit to be published said statements showing it in the condition aforesaid until it closed its doors and ceased doing business on January 21st, 1893. That after the insolvency aforesaid it continued to pay out large semi-annual dividends on its stock of from 4 to 8 per cent., until within a short time of its closing its doors as aforesaid and ceasing to do business.

18 That after said *business* became insolvent as aforesaid the said defendants permitted said bank to continue in business and receive deposits from plaintiffs and others, the defendants having knowledge of such insolvency, or ought to have known, and could have known by the exercise of ordinary care in the discharge of their duties as directors, or acting as directors, but of the insolvency of said bank this plaintiff was at all times entirely ignorant .

That while said Bank was insolvent as aforesaid the defendants negligently and fraudulently caused and permitted advertisements and statements to be made and published in the Lincoln Nebraska daily and weekly newspapers setting forth the solvency of said Bank for the purpose of inducing plaintiff and others, and the public generally, to deposit and keep money in said Bank, and the plaintiff relying on said statements as it had the right to do, deposited and loaned its money to said Bank as hereinafter stated.

That if it had not been for such false statements aforesaid and for those hereinafter set forth this plaintiff would not have deposited and loaned any money to said bank as it continued to do from time to time as hereinafter set forth, nor would it have allowed the same to remain therein, but on account of the false statements referred to aforesaid it allowed the same to remain on deposit, when but for said false and untrue statements it would have promptly withdrawn its loans and deposits before the failure of said bank, and that it was prevented from so doing by reason of said false and untrue statements aforesaid showing said bank to be in a good, sound financial condition and solvent, when in truth and in fact it was not in a good sound financial condition, but was wholly and utterly insolvent.

19 That on the 9th day of December, 1892, said bank being insolvent as aforesaid, the defendants for the purpose of in-

ducing the plaintiff and others to do and continue business with and to loan and deposit money with said bank made, caused, allowed and permitted a false statement of the condition of said bank, and its resources and liabilities, which said statement is hereto attached and marked "Exhibit A," which said statement was made caused, allowed and permitted to be made by the said defendants acting as such directors and officers of said bank, for the purpose of deceiving the plaintiff and others and induce- the plaintiff and others to do and continue doing business with said bank as aforesaid, and said defendants on said date caused allowed and permitted said false statement to be published in the newspapers of general circulation in Lincoln, Nebraska, and which said papers were of general circulation in the state of Nebraska.

Plaintiff avers that on the 28th day of December, 1886, the said defendants and each of them acting as such directors and officers of said bank, for the purpose of deceiving the plaintiff and others and for the purpose of inducing the plaintiff and others to believe said bank sound, solid and solvent, and to induce the plaintiff and others to do business with said bank as aforesaid made, caused, allowed and permitted to be made a false statement of its resources and liabilities, a copy of which statement is hereto attached, and marked "Exhibit B," and caused, allowed and permitted said statement to be published in various newspapers in general circulation in the city of Lincoln, Nebraska, which said newspapers were of general circulation in the state of Nebraska, for the purpose and with the intent to induce this plaintiff and others to loan money and deposit money with said bank, when in truth and in fact said bank was not in a sound, solid, safe and solvent condition, but was wholly insolvent.

This plaintiff avers that on — between January 3rd 1887 and January 21st, 1893, the defendants with the fraudulent intent and purpose as aforesaid, during all of said time made, allowed, caused and permitted to be made at divers intervals false statements of the condition of said Bank as to its resources and liabilities with the intent and purpose of deceiving the plaintiff and others as aforesaid and caused, acquiesced in, allowed and permitted said false statements, and each of them severally to be published in newspapers of general circulation in the city of Lincoln, Nebraska, which said papers aforesaid were of general circulation in the state of Nebraska.

And plaintiff avers that said statements and each of them showed, and the defendants in each of said statements, and by said statements represented that said bank was in a thoroughly sound, safe and solvent condition and was doing a prosperous business and was in all respects a safe and secure institution with which to do business, and a safe bank in which to make deposits and loans of money, and said statements were prepared and published and were caused, permitted and allowed to be prepared and published by said defendants for the purpose of making it appear to this plaintiff and others that said bank was sound, safe and solvent, and thereby inducing the plaintiff and others to believe and rely on said statements as aforesaid; that said statements and each of them was made and published

stating the resources and liabilities of said bank as aforesaid,
21 were read and looked over by the officers of the plaintiff corporation, which officers were in full control and management of plaintiff's business, and plaintiff avers that it believed them to be true and correct statements of the condition and resources of said bank, and that during said period of time,—the exact time of which plaintiff cannot at this time state—the said defendants had conversations with the officers of plaintiff as aforesaid at divers times during the time when said published statements were made as aforesaid between July 23rd, 1884 and January 21st, 1893, in which said conversations said defendants represented said bank of which they were directors and acting directors and officers was thoroughly safe and sound, and believing said published statements and advertisements as aforesaid and said verbal representations so made by said defendants to be true, and believing them to be true and relying upon the same, that said bank was sound, solid and solvent and doing a flourishing and prosperous business, as said published statements and advertisements showed, and as represented in said verbal statements, this plaintiff on the 3rd day of January, 1887 loaned to and deposited with said bank, of which the defendants were the directors and acting directors and officers a sum of money, and continued to loan and deposit with said bank from said date from time to time large sums of money up to and including the 21st day of January, 1893, which said sums of money so loaned and deposited with said bank varied, as plaintiff during all of said period withdrew and reloaned to said bank said divers sums of money, and plaintiff avers that on the first day of January, 1893, plaintiff had a balance to its credit amounting to Three Thousand Nine Hundred Ninety-
22 Eight and 63/100 ($3,998.63) Dollars, money it had loaned to and deposited with said bank and that from January 1st, 1893 to and including January 21st, 1893 (the day said bank closed its doors and ceased to do business) the plaintiff loaned and deposited with said bank the following additional sums of money, to-wit:

January	3rd,	1893	3806.60
January	5th,	"	2310.50
"	12	"	1079.21
"	14	"	254.00
"	16	"	909.50
"	18	"	1100.74
"	19	"	810.60
Balance due plaintiff January 1st, 1893			3998.63

Making a total due amount plaintiff from Capital National Bank $14810.96

That on sundry dates between January 1st, 1893, and January 21st, 1893 plaintiff withdrew from said bank $7313.79 leaving still due and owing from said Capital National Bank to the plaintiff the sum of $7497.17, which said sum now remains due plaintiff and wholly unpaid, except as hereinafter stated.

Plaintiff avers that said statements and advertisements so published as aforesaid, and said statements as verbally announced to the officers of said plaintiff, were, as the defendants and each of them well knew, and were in duty bound to know grossly exaggerated and wholly false and untrue, and that the liabilities of said bank were in each of said statements and advertisements grossly mis-stated, and the resources inflated and exaggerated as hereinbefore stated.

That whereas said statements and advertisements, and each of them, as well as said verbal statements made and caused,
23 allowed and permitted to be made, to the officers of plaintiff as aforesaid, showed that said bank was solid and solvent, and doing a flourishing business, when in truth and fact said bank was not doing a flourishing business, and was in fact at the time said statements and advertisements were published and verbally made, in an unsafe, precarious and insolvent condition, and at the time of the last published statement as aforesaid, and for a long time prior thereto, was in fact insolvent and could not pay the money owing plaintiff and others.

That the true condition of said bank was well known to said defendants at the several times they made said statements and advertisements as published and as verbally made to the officers of plaintiff, but notwithstanding they knew its unsafe and insolvent condition and had full access to its books and accounts and were in a position to know, and it was their duty to know the true condition of said bank, and they and each of them should and could have known its true condition by the exercise of ordinary care in the discharge of their duties as directors, and acting as directors and they each of them willfully neglected and recklessly for the purpose and with the intent aforesaid, made caused, allowed and permitted to be made and published said false statements and advertisements and verbal false statements as heretofore set forth for the purpose of inducing the plaintiff and others to do business with and make loans to and deposit money in said bank.

Plaintiff further avers that its knowledge of the condition of said bank was wholly derived from said published statements and advertisement, and by said verbal statements so made to its officers
24 by said defendants, and that had said *said* statements and advertisements so published and verbally made as aforesaid set out and given the true condition of said bank, it would have been shown that said bank was not sound, solid and solvent, and that it was not a safe institution in which to do business, and the plaintiff would not have made said loans and deposits with said bank.

Plaintiff avers that after making said loans and deposits with said bank, which were each and all made by said plaintiff relying upon said statements and advertisements as aforesaid, to-wit: on the 21st day of January, 1893, said bank suspended business and went into the hand of a Receiver, and that said bank then was, and had been for many years prior thereto and at the time of publishing said statements and advertisements and making said verbal statements by

said defendants to the officers of plaintiff as aforesaid insolvent and unable to meet its obligations, and could not pay its debts, and did not have the assets and resources that said defendants represented it had in said published statements, advertisements, and verbal statements made as aforesaid, and that by reason thereof said bank could not pay and did not pay this plaintiff any part of said sum of money loaned and deposited with said bank, except the sum of $1124.58, and that the remainder of said money so loaned and deposited with said bank has been wholly lost to this plaintiff by reason of the facts hereinbefore set forth.

Plaintiff states that by reason of the facts as above set forth and the false and fraudulent statements, advertisements and representations of the defendants the plaintiff has been damaged in the sum of Eleven Thousand ($11,000.00) Dollars.

25 Wherefore plaintiff prays judgment against the defendants and each of them for the sum of Eleven Thousand ($11,000.00) Dollars, its damages, with interest thereon from January 21st, 1893, at 7 per cent. and costs of suit.

UTICA BANK, *Plaintiff,*
By BURR & BURR.
GEO. W. LOWLEY, AND
BIGGS & THOMAS, *Its Attorneys.*

THE STATE OF NEBRASKA, *Seward County, ss:*

Geo. W. Lowley being first duly sworn deposes and says that he is one of the attorneys for the above named plaintiff, which is a corporation; that he has read the above and foregoing amended petition, and knows the contents thereof and that the facts therein contained are true as he verily believed, and further he saith not.

GEO. W. LOWLEY.

Subscribed in my presence and sworn to before me this 1st day of May, A. D., 1897.

[SEAL.] R. S. NORVAL,
Notary Public.

My commission expires May 5th, 1897.

"EXHIBIT A."

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business December 9, 1892.

Resources.

26	Loans and discounts	$768,601.44
	Overdrafts secured and unsecured	6,217.74
	United States bonds to secure circulation	50,000.00
	Stocks, securities, etc	325.00
	Due from approved reserve agents	107,090.01
	Due from other National Banks	17,800.33

Due from State Banks and Bankers		5,394.72
Banking house, furniture and fixtures		5,770.00
Other real estate and mortgages owned		38,716.92
Current expenses and taxes paid		14,286.28
Checks and other cash items		3,698.56
Exchange of clearing house		8,841.16
Bills of other Banks		2,355.00
Fractional currency, paper, nickels and cents		298.71
Specie		26,789.50
Legal tender notes		17,431.00
Redemption fund with United States Treasurer (5 per cent. of circulation)		1,350.00
Total		1,074,867.37

Liabilities.

Capital stock paid in		$300,000.00
Surplus fund		6,000.00
Undivided profits		21,180.75
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$356,139.33	
Demand certificates of deposit	158,545.14	
Due to other National Banks	81,574.14	
Due to State Banks and bankers	47,372.89	
		643,632.24
27 Notes and bills rediscounted		59,054.38
Total		$1,074,867.37

STATE OF NEBRASKA, *County of Lancaster, ss:*

I, R. C. Outcalt, Cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15th day of December, 1892.

HAL C. YOUNG,
Notary Public.

Correct.
Attest:
C. W. MOSHER,
C. E. YATES,
R. D. PHILLIPS,
Directors.

"EXHIBIT B."

Report of the Condition of the Captial National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 28, 1886.

Resources.

Loans and discounts		$737,462.12
Overdrafts		3,974.33
U. S. Bonds to secure circulation		50,000.00
Other stock, bonds and mortgages		22,739.34
Due from approved reserve agents		74,068.63
Due from other National Banks		56,215.29
Due from state banks and bankers		10,495.36
28 Real estate, furniture and fixtures		7,177.33
Current expenses and taxes paid		8,885.65
Premiums paid		7,188.43
Checks and other Cash items		13,742.02
Bills of other Banks		3,712.00
Fractional paper currency, nickels and cents		216.42
Specie		27,308.00
Legal tender notes		10,400.00
Redemption with U. S. Treasurer (5% circulation)		1,900.00
Total		$1,035,448.92

Liabilities.

Capital stock paid in		300,000.00
Surplus funds		12,000.00
Undivided profits		28,439.38
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$414,962.35	
Demand certificates of deposit	40,859.66	
Due to other National Banks	107,648.27	
Due to State Banks and Bankers	37,448.66	
		597,918.34
Notes and bills rediscounted		52,090.60
Total		$1,035,448.92

STATE OF NEBRASKA, *Lancaster County, ss:*

I, C. W. Mosher, President of the above bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

C. W. MOSHER, *President.*

Subscribed in my presence and sworn to before me this 11th day of October, 1886.

E. R. SMITH, *N. P.*

29 Correct.
Attest:
C. W. MOSHER,
C. E. YATES,
D. E. THOMPSON,
Directors.

And afterwards, on the 15th day of April, 1899, there was filed in the office of the said Clerk a certain Demurrer in words and figures following, to-wit:

THE UTICA BANK
vs.
CHARLES W. MOSHER ET AL.

Now comes the defendants Charles E. Yates and Ellis P. Hamer, and all other defendants and demur to the amended petition as amended by interlineation, for the following reasons:

1st. The said petition shows that this court has no jurisdiction to try and determine the issues in said action, the petition showing that the cause is founded upon the acts of negligence of the defendants as directors of the Capital National Bank and the alleged violation of their duty under the National Banking Act.

2nd. The said petition does not state facts sufficient to constitute a cause of action against these defendants and in favor of the plaintiff.

F. M. HALL,
J. W. DEWEESE, &
F. E. BISHOP,
Att'ys for Def'ts.

And afterwards, on the 11th day of June, 1901, the following Order of the court was had and entered herein, to-wit:

30 1795.

THE UTICA BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

And now on this day this cause came on to be heard on the demurrer to the petition, and said demurrer is overruled by the Court, to which ruling the defendants excepts and the defendant has 40 days in which to file answer.

And afterwards, on the 15th day of July, 1901, there was filed in the office of said clerk a certain Answer in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

UTICA BANK
vs.
CHARLES W. MOSHER ET AL.

Separate Answer of Charles E. Yates and Ellis P. Hamer to Plaintiff's Petition as Amended by Interlineation March 16, 1899.

Now comes the defendants Charles E. Yates and Ellis P. Hamer, and in obedience to the order of the court, each makes answer for himself separately to the plaintiff's petition as amended by interlineation on the 16th day of March 1899.

These defendants say that whether the plaintiff made the deposits in the Capital National Bank of Lincoln at the times and in the amounts stated in said amended petition, these defendants have not had knowledge or information, and they therefore deny that such deposits were made.

31 First Defense: These defendants each for himself alleges that the Capital National Bank of Lincoln, referred to in said amended petition, was organized and had its existence under and by virtue of the national banking act passed and approved by the congress of the United States. That Homan J. Walsh was the vice-president of said bank and Richard C. Outcalt was the cashier of said bank, and that each of the other defendants was director of said bank. That said bank was closed by the national bank examiner on or about the 23rd day of January 1893, and that soon after said date a receiver was duly appointed by the Comptroller of the Currency to take charge of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment.

That no forfeiture of the franchises of said banking association has ever been declared by the Comptroller of the Currency or adjudged by any court, for reason on the violation of any of the provisions of the national banking act by the directors and officers of said bank, or for any other reason.

That the duties and obligations of the directors of said bank were such and only such as are required by the national banking act under which said bank was organized and existing.

These defendants deny that they signed or attested the reports set out and referred to in the said amended petition, and deny that they made, signed or attested any report purporting to show the condition of said bank for the purpose and in the manner alleged in the plaintiff's said amended petition.

32 These defendants further say that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true, constituted a violation by these defendants as *as* directors, of their duties as such directors as laid down and defined in the national banking laws of the United

States above referred to, concerning the government and management of national banks, and these defendants allege that if any liability attached to them or either of them as directors of said bank for any act done or duty neglected as set forth in said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of these defendants or either of them, there is necessarily involved the construction of said national banking act relating to the duties of directors of national banks. That a federal question is involved in determining the liability of these defendants by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of these defendants.

These defendants further answering, each for himself, denies each and every allegation in the plaintiff's petition, except as hereinbefore stated and admitted.

Second Defense: These defendants further say, each for himself, that the plaintiff on or about the 27th day of October 1893, brought an action against these defendants in the district court of Lancaster county, Nebraska, on the same cause of action as now set out in the plaintiff's amended petition, and that a removal of said cause
33 of action from the Lancaster county district court to the United States Circuit Court for the district of Nebraska was duly made, and after filing said cause of action in the United States court on removal, a motion was duly made by the plaintiff, the Utica Bank to remand said cause to the District court from which it had been removed, and which motion was overruled. And this plaintiff on its own motion dismissed said cause of action and a judgment for costs was rendered in said court against the plaintiff and in favor of these defendants in the sum of $125.93 and the plaintiff has failed and neglected to pay said judgment for costs. That said judgment is in full force and effect and remains unsatisfied.

These defendants therefore aver that the plaintiff under the law and practice is and ought to be barred and estopped from prosecuting these defendants on this claim, on account of its failure to pay said judgment for costs. That this litigation is vexatious and an abuse of the process of this court, and this action should be dismissed out of court.

Third Defense: As a further defense to the plaintiff's pretended cause of action as set forth in its petition as now amended, these defendants say, each for himself, that said cause of action now pending was commenced in the district court of Seward county, Nebraska, on or about the 25th day of February 1895 by said plaintiffs, making Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt and Rolla O. Phillips, defendants. That on or about the 9th day of July 1895 the said plaintiff took judgment in this action against the defendant
34 Ambrose P. S. Stuart, for the full amount of his claim as made against all of the defendants the plaintiff's cause of action being a joint and several claim against each and all of the defendants. That said judgment so rendered in the district court of Seward County in favor of the plaintiff Utica Bank and

against the said defendant Stuart has not been reversed or set aside, but in due course of time executions were issued on said judgment for the collection of the same, and levies were duly made upon the property belonging to the said defendant Stuart and said property was sold in satisfaction of the said judgment rendered in favor of the plaintiff.

And these defendants allege the fact to be that the plaintiff's claim against these defendants so ripened into judgment has been fully paid and satisfied and the judgment should be discharged of record if it has not already been so discharged, and that said judgment so taken by the said Utica Bank against the said defendant Stuart and the payment thereof is a complete bar against any further judgment or claim in favor of the said plaintiff against these defendants.

Fourth Defense: These defendants for a further and separate defense to the plaintiff's cause of action, say that as hereinbefore alleged in the first defense in this answer, these defendants in all of their actions concerning and in connection with the said bank acted in their capacity as directors of said national bank, and if they neglected any duty as such directors or committed any of the wrong complained of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against these defendants sounding in damages, said cause of action existed, if any, in favor of the said bank or receiver of said bank after his appointment, and not in favor of this plaintiff.

These defendants allege the facts to be that if the plaintiff deposited his money in said bank as alleged, and the bank then failed and became insolvent, the plaintiff could not individually recover the said money from the said bank, and that the said money as *as* well as any damage caused by the alleged neglect of duty on the part of these defendants, did not give rise to any cause of action in favor of this plaintiff; but allege the fact to be that if such damages resulted from the conduct or neglect of duty on the part of these defendants, a judgment therefor under the law could only be recovered by the said bank in its corporate capacity or by the receiver of said bank; and such damage recovered, would under the law be distributed ratably by the said bank or by the receiver of said bank, among the creditors and stockholders of said bank.

These defendants, each for himself, de*nied* all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

These defendants therefore allege that the plaintiff has no cause of action against defendants or either of them.

Wherefore, the defendants pray judgment for costs.

J. W. DEWEESE,
F. M. HALL AND
FRANK E. BISHOP,
Att'ys for Def'ts.

STATE OF NEBRASKA, *Lancaster County, ss:*

C. E. Yates, being first duly sworn, upon his oath says that he is one of the defendants in the above entitled cause; that he has read the foregoing answer, knows the contents thereof, and that
36–54 the facts therein set forth are true, as he verily believes.

C. E. YATES.

Subscribed in my presence and sworn to before me by the said C. E. Yates, this 15th day of July, A. D. 1901.

WM. B. KIRBY,
Notary Public.

* * * * * * *

55 And afterwards, on the 23rd day of August, 1901, there was filed in the office of the said Clerk, a certain Reply in words and figures following, towit:

In the District Court of Seward County, Nebraska.

BANK OF UTICA, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Reply to the Separate Answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher, and Richard C. Outcalt.

And now comes the plaintiff and for its reply to each of the separate answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher and Richard C. Outcalt, *and* denies each and every allegation of new matter *continued* in their several answers.

BANK OF UTICA,
By R. S. NORVAL,
GEO. W. LOWLEY,
J. J. THOMAS &
L. C. BURR.

STATE OF NEBRASKA, *Seward County, ss:*

Fritz Beckard, being duly sworn, says that he is the President of the Utica Bank, plaintiff, which is a corporation. That he has read the foregoing reply and knows the contents thereof and that the same are true as he verily believes.

FRITZ BECKARD.

Subscribed in my presence and sworn to before me this 23 day of Aug., A. D. 1901.

[SEAL.] JOSEPH JONES,
Notary Public.

And afterwards, on the 28th day of May, 1902, there was filed with the Clerk of said Court a certain Stipulation in words and figures following, to-wit:

56 In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

THE JONES NATIONAL BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

UTICA BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Stipulation.

The parties to this stipulation in each of the above entitled causes which are now pending in the district court of Seward county, Nebraska, hereby stipulate and agree that all of said causes shall be tried in the District Court at one and the same time, and that the evidence proper and applicable in any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, subject of course to the objections of either of the parties to this stipulation and governed by the ruling of the Court, shall be offered and produced and the cases respectively disposed of by Court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence, insofar as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation, shall be considered by the jury in such case in the disposition thereof; and such evidence being properly applied to any one or to all of the parties to this stipulation as the facts of the *Court* may warrant.

57–61 This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in such case may be received, and that then the whole evidence as thus introduced shall be properly applied to each respective case and to each respective party thereto under the rulings and directions of the Court, subject to the objections of either party.

It is therefore agreed that if either party or any party to any of

said causes represented in the stipulation shall desire to prosecute error from the judgment of the District Court in any or in all of said cases, a transcript of the testimony given on the trial of all of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one bill of exceptions, and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases, and that the bill of exceptions settled in one case shall be the bill of exceptions in each and all of said cases.

In Witness Whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,
J. J. THOMAS,
Attorneys for Plaintiffs.
H. F. ROSE AND
J. W. DEWEESE,
Attorneys for D. E. Thompson.
J. W. DEWEESE,
Att'y for Def'ts Yates, Walsh Estate, & Hamer Estate.
CHAS. O. WHEDON,
Attorney for Chas. W. Mosher and R. C. Outcalt.

* * * * * * *

62–68 And afterwards on the 28th day of May, 1902, there was entered of record in the Journal of this Court the following, to-wit:

UTICA BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

And now on this 28th day of May, A. D., 1902, the same being a day in the regular May, 1902 term of said District Court, came the parties to this action, and their attorneys, and also the following named persons as jurors, to-wit: M. Mikkelson, O. E. Imm, Joseph E. Wolf, August Gade, J. J. Endicott, F. Ihde, H. Meinberg, J. M. Dailey, C. D. Becker, John Martin, George Moore, and John Metz, who were duly impaneled and sworn according to law, and the trial proceeds.

And on the same day comes the defendants and except to certain portions of the deposition of J. W. McDonald, on consideration whereof said exceptions are overruled. Defendant- excepts to the ruling of the Court.

And the hour of adjournment having arrived, and the trial of said cause not having been concluded, the further hearing and trial thereof is continued until tomorrow morning at 9 o'clock.

* * * * * * *

69 And afterwards on the 19th day of June, A. D. 1902 there was filed of record in the office of said Clerk a certain Instructions to the Jury, in words and figures following, to-wit:

70 In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST
v.
CHARLES W. MOSHER ET AL.

JONES NATIONAL BANK
v.
CHARLES W. MOSHER ET AL.

UTICA BANK
v.
CHARLES W. MOSHER ET AL.

THOMAS BAILEY
v.
CHARLES W. MOSHER ET AL.

Instruction to Jury.

GENTLEMEN OF THE JURY:

1st. The jury are instructed that these actions were brought against C. W. Mosher, President of the Capital National Bank, and R. C. Outcalt Cashier of said Bank, and against D. E. Thompson, Charles E. Yates, Ellis P. Hamer and R. O. Phillips as directors of said bank, and Homan J. Walsh as Vice President of said bank, the defendants Walsh, Hamer and Phillips have since died and the estates of Hamer and Walsh are represented in these actions by their administrators. No revivor of the action against R. O. Phillips has been had, and consequently you can not find any verdict against Phillips.

Given.

2d. All of the foregoing entitled cases are submitted to you for determination at one trial and on the same evidence, so far as such evidence is applicable to the respective cases and to the respective defendants. Each of the defendants make a separate defense, and each of the defendants in each of the cases can only be bound or affected in any way by such evidence as may be applicable to

71 him and to his conduct under the charges made in the respective petitions of each case.

Given.

3d. The jury are instructed that in considering the various charges and allegations made against each defendant in the several cases submitted to you, you are not to arrive at any conclusion or determine any fact by mere conjecture or speculation; and you are further instructed that the burden of proof is upon the plaintiff to establish the facts alleged against any defendant in these several actions; and you must determine such facts from the evidence relating to such charges and facts and not determine the same by inference, not founded upon evidence, conjecture or guess-work.

Given.

Defendant- severally except. S. H. Sornborger, Judge.

4th. The jury are instructed that if you find that one or more of the defendants named in each of said cases have been guilty of negligence, misconduct and fraud, charged in said petitions in the several cases, that fact would not affect any one of the other defendants, nor make such other defendants, or any one of them guilty of such negligence, misconduct and fraud. In other words, although you may believe from the evidence that one of the defendants named had done and committed or neglected the things charged in the petitions in the different cases under the proof rendered, yet you are instructed that the negligence and misconduct and fraud of each defendant can be attributed to no one of the other defendants without proof that such other defendant, or defendants participated therein.

Given.

Defendants severally except. S. H. Sornborger, Judge.

72 Second 4th.

4th. Each of the plaintiffs above mentioned allege substantially, in the same or similar form, the — general allegations in their petitions, the principal difference in the petitions being the amount which each severally alleges it had on deposit, or had loaned to the Capital National Bank, of whom the defendants are alleged to be officers and directors, and the amount claimed in their several petitions, and the sum- which should be credited to them as having been either paid by the Receiver of the bank at divers times, to-wit, 17%, and the amounts which *are* realized on the sale of the property of the former defendant in this action, Stuart, to be ratably applied, is undisputed and the several amounts, together with interest thereon to this date is as follows: The Bank of Staplehurst $13,510.96, Jones National Bank, $16,888.43 Utica Bank $8,292.92. Thomas Bailey $11,054.69.

And these several sums are the amounts to be named in your verdict as the sum which the said several plaintiffs may recover against the defendants whom you may find liable under the evidence and instructions, in case only your verdict should be for the plaintiffs, or such of them as you may find in favor of.

Given.

Defendants severally except. S. H. Sornborger, Judge.

5th. Each of the several *defendants* allege that the defendants mentioned in said several petitions were the officers and directors of the Capital National Bank, doing a banking business in the City of Lincoln, and that by reason of the statements made by such officers and published in the Nebraska State Journal, and the Evening Call, newspapers alleged to be published in Lincoln, of the condition of said bank and showing said bank to be — solvent and prosperous condition, the said several plaintiffs were induced to, and did

73 deposit the several sums of money above indicated to you, in said bank, relying upon said representations so published as to the solvent condition of said bank.

And the plaintiffs allege that statements of its condition showing the solvency and soundness of said bank were published at divers

and sundry times from the year 1886 down to and including December 9th 1892.

And the plaintiffs severally allege in their several petitions that said statements as to the condition of said bank were at all times during said period wholly false and untrue, and that in fact and in truth the said bank was not at any of said time or during said period solvent and in sound condition, but was in fact and in truth in an insolvent condition.

And the plaintiffs severally allege that the resources of said bank were stated in said several statements published by the said defendants grossly exaggerated and inflated, and stated to be greater than in truth they were, and that the liabilities of said bank at all times *was* by said published reports made to appear less than said liabilities of said bank really were, and that much of the nominal assets of said bank, such as its Bills Receivable and Stocks and Bonds were, while represented by said reports to be assets of value, in fact worthless and uncollectible, and of little or no value. And that its liabilities were much greater than was represented in said statements so published or permitted to be published by the said defendants.

That by reason of the worthlessness of said assets and by reason of the excess of its liabilities, and by reason of the mismanagement and inattention, and gross negligence of the defendants the said bank about the 21st day of January, 1893 suspended business closed its doors and was taken possession of by a receiver. And that by reason of the premises the plaintiff- lost the sums of money severally, and — that time on deposit in said bank as hereinbefore set forth.

Given.

Defendants severally except.

74 6th. The defendants answering severally, each for himself, admit their relationship as officers and directors, of the bank at and during the time alleged in the petition, and admit that said bank was closed by a bank examiner, about the 23rd day of January, 1893, and allege that it has been in the control of a Receiver since that time. Each of the defendant directors, and also the defendant Walsh, denies that he signed or *attached* the reports of the condition of said bank referred to in said petitions and denies that he made, signed or attested any report purporting to show the condition of said bank for the purpose and in the manner alleged in the plaintiffs' said petitions. And they and each of them deny every allegation of the plaintiffs' several petitions except those allegations admitted as above stated.

Given.

Defendants severally except. S. H. Sornborger, Judge.

7th. These allegations of the petitions and denials set forth in the answer- constitute the issues to be tried in these cases. And the burden of proof is therefore upon the plaintiffs to show by a preponderance of the testimony the truth of the allegations contained in their several petitions. In other words the burden is upon the plaintiffs severally to show that the defendants severally published or caused to be published or participated in the publication of statements of the condition of the Capital National Bank from time to

time during its existence as by the plaintiffs severally alleged; to show that the plaintiffs each for himself, or itself, relied upon the truth of said statements of the condition of said bank, and to show that such statements were untrue, that is to say that said bank was insolvent, or that its assets were not truly stated, or that its liabilities were understated to such degree and extent as to impair
75 its solvency

Given.

Defendants severally except. S. H. Sornborger, Judge.

8th. The mere fact that a bank was insolvent at any time, or at all times, standing by itself, would not entitle the plaintiffs or any of them to recover. The mere fact that it was insolvent at any time or at all times, and that statements were published by the defendants or any of them, which were essentially false would not entitle the plaintiffs or any of them to recover. The plaintiffs, and each of them in addition to proving both the above propositions must in addition thereto prove by a preponderance of the testimony that such published statements of the condition of the bank come to their notice, and was relied upon by them, and that they acted in reliance upon them on making their loans to or deposits with said bank before they could recover from the defendants or either of them.

The mere fact, however, that other inducing causes operated together with the foregoing considerations such as the obtaining of a higher rate of interest would not render the defendants or any of them less liable, provided always that such plaintiffs had notice of and relied upon the truthfulness of the published reports.

Given.

Defendants severally except. S. H. Sornborger, Judge.

9th. Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages sustained by one depositing money in such bank in reliance upon the false representation of the condition of the bank contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue.

Given.

Defendants severally except. S. H. Sornborger, Judge.

76 10th. The director of a bank who publishes, or participates in the publication of a report of its condition, by such act asserts that the statements contained in such report are substantially true, and he cannot rely upon his ignorance of the true condition of the bank as a defense to an action, when he is such published reports represents the bank to be solvent, if in truth it is not solvent and its assets are fictitious or worthless or its liabilities so much greater than its assets as to render the bank insolvent.

Given.

Defendants severally except. S. H. Sornborger, Judge.

11th. It is not alleged by the plaintiffs and the proof does not indicate that all of the officers and directors of the Capital National Bank signed any one of the alleged public statements of the condition of the bank; it is required of the bank and its officers and

directors that such statements should be verified by the oath of the President or the Cashier, and attested by at least three of the Board of Directors, consequently it was not necessary in any one report for each, or all of the directors and officers of the bank either to sign or verify such published statement. And in the particular case of the defendant H. J. Walsh, who was as before stated to you Vice President of said bank, it is not in evidence that at any time he signed his name to any of the published statements aforesaid.

It is alleged in the several petitions however, that each and all of said defendants at divers and sundry times, either as officers or directors, made out, signed and published, or caused to be made out signed and published the statements in question.

You are instructed in that behalf, that it is not necessary in order to create a liability of any one of the defendants for the plaintiffs to show that any such director or officer actually with his own
77 hand signed and caused to be published the statements alleged to have been published. It is sufficient if the plaintiffs have shown that such officer or director participated in making and publishing the said statements.

Given.

Defendants severally except. S. H. Sornborger, Judge.

12th. In determining whether or not the defendant directors or officers did in fact participate in any or all of the statements alleged, or shown to have been put forth and published, besides considering any testimony, if any, which goes directly to show that such director or officer personally signed the same, you are at liberty to take into consideration the length of the time such officer or director had been in the service of the bank in such capacity at the time of any particular publication, the opportunities which he had for knowing the course of events in the bank, and of knowing that the bank officers and directors were issuing statements of the condition of the bank and causing the same to be published in the public newspapers, and consider from all these facts and circumstances taken together with all the other testimony touching upon the same, whether or not he in fact participated in and assented to the issuance and publication of such statements.

Given.

Defendants severally except. S. H. Sornborger, Judge.

13th. And although you should find from the testimony that any particular director or officer of said bank did not himself directly cause to be issued and published the statements concerning the condition of said bank yet if you should find that at the time such statements were being published in the public press, such director or officer was a resident of the city of Lincoln, was in a condition of health to be about giving his ordinary attention to business, and
78 was not absent from home, that is absent from the city of Lincoln, such facts should be taken into consideration by you, together with other evidence and circumstances in the case in determining whether or not that officer or director knew of and

participated in the issuance and publication of any or all of the statements of the condition of said bank.

Given.

Defendants severally except. S. H. Sornborger, Judge.

14th. By assets of a bank are meant all that class of valuable property, pertaining to and belonging to the bank, including its money, and its bonds, its real estate, its accounts of deposit with other banks and bankers, its Bills Receivable and its overdrafts. But a worthless overdraft, Bills Receivable or account, which as we commonly understand the term, is not collectible and against persons shown to be insolvent is not an asset of the bank.

The liabilities of a bank, generally speaking, consist of the items of account which it owes to other people including its deposits whether upon certificate or open account. Whether a bank is solvent or insolvent at any particular time depends upon whether its available assets as before defined, are sufficient in amount to meet its liabilities. A bank is not solvent merely because upon any particular day, or at any particular time it should not have sufficient money or cash items of account to immediately pay all of its liabilities, but is only insolvent when all its available and good assets are insufficient to pay all its liabilities.

Given.

Defendants severally except. S. H. Sornborger, Judge.

79 15th. There has been testimony offered tending to show that the names of accounts in the books were not always the same as the names of the accounts in the published statements of the affairs and concerns of the bank.

In that behalf you are instructed that a mere change in the name of an account and its nature is not actually falsified and made to appear different from what it really is, is not such a misrepresentation as can be complained of.

In order to be a material misrepresentation it must be such a misrepresentation of the assets, as before defined, and of the liabilities of the bank as to misrepresent the real and actual condition of the bank.

Given.

Defendants severally except. S. H. Sornborger, Judge.

16th. You are instructed that proof that a President or Cashier misappropriated or embezzled funds of the bank, or falsified the books of account is not of itself sufficient to establish actionable negligence against the directors who have not participated therein, but if such embezzlements or misappropriations or falsifications are of such great extent, and are of such long continuance as would have, upon reasonable examination, challenged the attention of an ordinarily prudent business man then you would be justified in finding that the directors were charged with notice of such misappropriation or embezzlements and falsifications.

Given.

Defendants severally except. S. H. Sornborger, Judge.

80 17th. It is the duty of bank officers and directors to give to the affairs of a bank such reasonable care and supervision

and oversight as ordinary men of business prudence exercise in the supervision and care of their own business affairs and concerns which they delegate to the immediate administration of others.

Given.

Defendants severally except. S. H. Sornborger, Judge.

18th. You are instructed that the credibility of witnesses, and the weight to be given to the testimony of each is a matter exclusively for the jury. The jury have the right to determine from the appearance of the witness on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances appearing on the trial find which witnesses are the more worthy of credit, and to give credit accordingly.

Given.

Defendants severally except. S. H. Sornborger, Judge.

19th. In considering the weight to be given to the testimony of any witness it is proper for you, and you should take into consideration among other matters heretofore referred to in the foregoing instructions, the interest of the witness if any in the event of the suit, their temper or feeling of bias, if any has been shown by them in their testimony, and their means of information as to the subject concerning which they testify, and to give such credit to the testimony of each witness as under all the circumstances such witnesses to be entitled to.

Given.

Defendants severally except. S. H. Sornborger, Judge.

81 20th. By the preponderance of the testimony the court means the greater weight of evidence; that is to say, the preponderance of evidence upon any given issue, where the evidence is conflicting upon such issue, is that which, upon consideration of all the facts and circumstances proved at the trial produced the greater impression of truth upon the mind.

Given.

Defendants severally except. S. H. Sornborger, Judge.

21st. The preponderance of evidence in a case is not however, alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of testimony is, the jury should take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest if any in the result of the suit, the probability or improbability of the accuracy and certainty of their memory of the events of and concerning which they testify, and in view of all these, when taken in connection with all the other testimony in the case, or upon an issue in the case determine upon which side is the preponderance or weight of the evidence.

Given.

Defendants severally except. S. H. Sornborger, Judge.

1st. A director or executive officer of a National Bank is responsible for the making and publication of a false report of its finan-

cial condition, tho' he did not personally make and publish such statement, if he in any manner participated in the making or publication thereof. A director of a National Bank is presumed to know its true condition and that the law requires true statements of
82 its affairs to be made and published by the Bank from time to time, and if one has been a director or executive officer of such a bank for a long period of time he is presumed to have knowledge of the making and publishing of the statements of its condition, and the burden is cast upon him to overcome this presumption by competent evidence.

Requested by plaintiffs.

Given.

Defendants severally except. S. H. Sornborger, Judge.

2d. The jury are instructed that inasmuch as the law required that all reports made by a National Bank to the Comptroller of the Currency shall be published at the expense of the bank, in a newspaper at the place where the bank is established, you have a right to consider such published reports as have been introduced in evidence in this action purporting to have been signed, and whose name appear- in such published reports, as having been authorized by such defendants, so appearing to have signed the same.

Requested by plaintiffs.

Given.

Defendants severally except. S. H. Sornborger, Judge.

22d. You are instructed that if the evidence under the instructions of the Court justify it, you may, in each case return a verdict against all of the defendants, or if it does not justify a verdict against all of the defendants in any or all of such cases, your verdict should be returned only against such defendants as you may find liable under the evidence and instructions. If under the evidence and instructions of the court you should find against any or all of the plaintiffs, you should return a verdict according to such finding.

83 But you are at liberty if the evidence so justifies it to omit from either or all of your verdicts, in either or all of said cases, the name of any defendant whom in your judgment is not, under the evidence and instruction of the court liable in the premises.

Three blank verdicts in each case will be furnished you as follows:

One of which in each case is a verdict in favor of the defendants.

One of which in each case finds against all of the defendants.

The other of which in each case in favor of the plaintiffs, has in its blanks which you may fill in with the names of such of the defendants as you may find against.

23rd. For your convenience in making up your verdicts the court here states to you the full name of each of the defendants named in the several cases as follows:

Charles W. Mosher, George M. Walsh and Warren W. Walsh Administrators of the estate of Homan J. Walsh deceased; Charles E. Yates; Richard C. Outcalt; Louisa Hamer executrix of the estate of Ellis P. Hamer deceased; and David E. Thompson.

24th. You are instructed and you will bear in mind that in

case of The Bank of Utica *v.* Mosher, *et al.* and in the case of Thomas Bailey *v.* Mosher, *et al.,* David E. Thompson is not a party defendant, and your verdict in those two cases could not be against said Thompson, and in the form of verdicts furnished you, if you should find against all of the defendants as before suggested is omitted the name of Thompson in those two cases. He is, however, a defendant in the other two cases in this action.

25th. At the request of the defendants Walsh Administrators there is submitted for your consideration three questions in each of these cases, to which you should return an answer "Yes" or
84 "No" to each question in each case. The first question is

Did Homan J. Walsh ever qualify or act as a Director of the Capital Bank?

The second question is

Did Homan J. Walsh ever sign any report of the condition of the Capital National Bank, mentioned in pleadings or shown in the evidence.

Third.

Is Homan J. Walsh shown by the evidence to have actively participated in the making of any report of the condition of the Capital National Bank mentioned in the pleadings or shown in the evidence.

26th. You are instructed that the second of said questions should be answered "No" since the Court has already instructed you that there is no evidence that the said Walsh ever signed any of the reports of the condition of the Capital National Bank.

The First and Third of said questions you will answer "Yes" or "No" according as you shall find from a consideration of the evidence upon either and both of said questions.

27th. When you shall have agreed upon your verdict your foreman should sign the four verdicts (one in each case) conformable to your findings, unless you should find in favor of the plaintiffs and against a part only of the defendants. On the other hand, if you should find in favor of the plaintiffs and against a part only of the defendants it will be necessary for you to insert in the blank left in the verdicts the full name of the defendants against whom you find.

You will also, as before instructed, make the special findings before referred to, and your foreman will sign the four special verdicts, and when you have agreed upon your verdict, and agreed upon the answers to the first and third questions of the special verdict
85 in each of these cases, you will return with the same into court.

S. H. SORNBORGER, *Judge.*

And afterwards, on the 19th day of June, 1902, the following entry was made of record herein, to-wit:

UTICA BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

And now on this June 19, 1902, comes *the* Court, the above named jurors, the parties to this action, and their respective attorneys, pursuant to adjournment, and the trial proceeds. And said jurors having heard all the testimony, the argument of counsel, the instructions of the Court, retired in charge of the sheriff for deliberation, and on the same day returned into open Court the following verdict in writing, and the following special findings in writing on special interrogatories requested on the part of the defendants.

STATE OF NEBRASKA, *Seward County, ss:*

May Term, A. D. 1902, to-wit, May 19, 1902.

UTICA BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

We, the jury in this case, being duly impaneled and sworn in this action, do find and say that we find for the plaintiff and against each and all of the defendants, and we assess the amount of
86 the plaintiff's recovery against each and all of the defendants at the sum of Eight Thousand Two Hundred and Ninety-two and 92/100 Dollars, ($8292.92.)

J. J. ENDICOTT, *Foreman.*

In the District Court of Seward County, Nebraska.

UTICA BANK
vs.
C. W. MOSHER ET AL.

The jury will answer the following questions to be signed by the foreman of the jury:

1. Did Homan J. Walsh ever qualify as a director of the Capital National Bank?

Ans. No.

J. J. ENDICOTT, *Foreman.*

2. Did Homan J. Walsh ever sign any report on the condition of the Capital National Bank mentioned in the plaintiff's petition.

Ans. No.

J. J. ENDICOTT, *Foreman.*

3. Do you find from the evidence that Homan J. Walsh ever took part in the making and publishing of the reports or any report of the condition of the Capital National Bank.

Ans. Yes.

J. J. ENDICOTT, *Foreman.*

When a mistake has been made in writing a word in the findings, shall we draw a pen through the error in order to make the correction?

Answer. If you have mistakenly written a wrong or unintentional word in the findings it is proper for you to draw a pen through
87 it & insert instead of it the word you desire to return as your answer.

S. H. SORNBORGER, *Judge.*

And afterwards, on the 19th day of June, 1902 there was filed of record in the office of said Clerk a certain Request of Instructions to Jury in words and figures following, to-wit:

In the District Court, Seward County, Nebraska.

THE BANK OF STAPLEHURST
vs.
CHARLES W. MOSHER ET AL.

JONES NATIONAL BANK
vs.
CHARLES W. MOSHER ET AL.

UTICA BANK
vs.
CHARLES W. MOSHER ET AL.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Instructions Requested by Defendants Thompson, Yates, Hamer, and Walsh.

1. The jury are instructed that these actions were brought against C. W. Mosher, President of the Capital National Bank, and R. C. Outcalt, Cashier of said Bank and against D. E. Thompson, Charles E. Yates, Ellis P. Hamer and R. O. Phillips as directors of said bank, and Homan J. Walsh as Vice President of said bank, the defendants Walsh, Hamer and Phillips have since died; and the estate of Hamer and Walsh are represented in these actions by their administrators. No revivor of the action against R. O. Phillips has been had, and consequently you can not find any verdict against Phillips.

2. All of the foregoing entitled cases are submitted to you for determination at one trial and on the same evidence, so far as such evidence is applicable to the respective cases and to the respective
88 defendants. Each of the defendants makes a separate defense, and each defendant in each of the cases can only be bound or affected in any way by such evidence as may be applicable to him

and to his conduct under the charges made in the respective petitions of each case.

3. The jury are instructed that the Capital National Bank was organized under the National Banking Act; such act provided that no less than five persons from among the stockholders of such bank should be elected to act as directors of the bank.

As the act was originally passed such directors were required to manage and carry on the banking business in the bank of which they were directors, but under the law as amended in 1874, and as appears in Section 5136 of the National Banking Act, the directors of the Capital National Bank had the power — appoint a President and Cashier to act as the officers and agents of said bank, and authorize them to carry on the active management of the Bank's business.

And you are instructed that the oath which the national bank director has been required to take under the Act as it first was drawn, to the effect that he would not knowingly violate, or willingly permit to be violated, any of the provisions of the National Banking Act, was so changed by the amended Act of 1874, by inserting the words: "so far as the duties devolved on him."

Refused.

Excepted to by J. W. Deweese Att'y for Walsh estate & the def't directors. S. H. Sornborger, Judge.

4. The jury are further instructed that — the National Banking Act under which the Capital National Bank was acting during the time alleged in the plaintiff's petitions, it was required to make not less than five reports for each year to the Comptroller of the Currency, and have the same published in a newspaper at the
89 place where the bank was doing business, such report was required to be sworn to by the President or Cashier of the bank and attested by at least three directors. The assets and liabilities of the bank were required to be listed under the proper heads and according to the form prescribed by the Comptroller, and you are instructed that the reports thus required to be made do not purport to give the value of the assets, nor certify to the solvency of the bank, or the makers of its paper, but simply set forth the resources and liabilities of the bank.

Refused.

Excepted to by J. W. Deweese, Att'y for Walsh & the Def'ts Directors. S. H. Sornborger, Judge.

5. The jury are instructed that reports of the assets and liabilities of the bank made to the Comptroller and published in a newspaper are not an act of the officers and whole directory of the bank, but simply the act of such officers, who made and swore to the same, and such directors as attested such report; any any director who did not attest such report is not held responsible for anything stated therein.

Refused.

Excepted to by J. W. Deweese, Att'ys for Def'ts Walsh estate and Directors. S. H. Sornborger, Judge.

6. The jury are instructed that if you find from the evidence introduced in reference to any of the directors named in any one of the said cases that each director did not knowingly violate any of the requirements of the National Banking Act under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be
90 in favor of such defendant.

Refused.

Exception by J. W. Deweese, for Walsh Estate & the directors.
S. H. Sornborger, Judge.

7. If the jury finds that the defendant Mosher made a false credit to the account of the State Treasurer, and made other false entries and manipulations of accounts in the books of the bank, and wrongfully issued certificates of deposit for his own interest and benefit without authority, without the knowledge or consent of the directors, which could not by ordinary care and attention in the usual course of the official duties of directors be discovered, then you are instructed that the directors would not be responsible either collectively or individually for the fact of such false entries and manipulations of the bank's account.

If false entries and manipulations were had and done by defendant Mosher in the use of the books of the bank, that fact would not carry notice to the directors. It would be a mis-use of words and inconsistent with honest thought to say that because entries were made to conceal the real facts in the books, would bring notice to the directors.

False entries and manipulations of figures in the books purposely kept in the manner to conceal the truth, do not either in law or morals, carry knowledge of such facts. If the defendant Mosher had knowledge of the truth, even though he was president of the bank, his knowledge of his own frauds perpetrated for his individual purposes could not be attributable to the directors of the bank.

Refused.

Excepted to by J. W. Deweese for Walsh estate *A* Def'ts directors.
S. H. Sornborger, Judge.

91 8. The jury are further instructed that the defendant Mosher, being president of the bank, like any other agent of a corporation, could bind the bank within the scope of his authority; but this principle of law has no application to a case where the president of the bank goes outside of his authority and acts for himself in his own interest and adversely to the interest of the bank of which he is president.

If Mosher acted in any fraudulent transaction for his own interest and against the interest of the bank, such act is not within the operation of the rule that the principal for which he is agent is bound by his act, for two reasons:

First. In such a case he would be acting for the interest of himself and not for his principal, the bank;

And secondly, he would not communicate to his principal an act

of fraud which he was interested in concealing; consequently, it is both unjust and unreasonable and contrary to law to say that the directors of the bank or the bank itself should be bound by such acts.

Refused.

Excepted to by Def't directors Walsh estate, J. W. Deweese. S. H. Sor-borger, Judge.

9. The jury are instructed that if you find in these cases that the Comptroller of the Currency furnished printed blanks on which reports were to be made, and the blanks thus printed set forth certain headings and titles under which the assets of said bank were to be listed; and you further find that the accounts in the bank's books were not kept under the same headings and titles printed in said blanks, and that consequently some of the items kept in the bank's books had to be reclassified in order to come under the proper headings as printed in the b-anks for the making of said reports, then you are instructed that such classification of the assets and liabil-

92 ities of the bank would not in itself make such report false, even if it did not literally agree with the amounts stated under the headings and totals as kept in the bank's books. In other words, if the accounts are reclassified in order to properly fit the headings of the blank report, this in itself was not the making of a false report. And if when such report was called for, the person or persons making and attesting it, entered under the headings and titles of the prescribed form, a true statement of the bank's assets and liabilities on the day called for, such report fulfilled the demands of the law, and would not be a false report.

Refused.

Excepted to by Def't directors & Walsh estate, J. W. Deweese. S. H. Sornborger, Judge.

10. You are further instructed that a report is not necessarily false, even though it might state an account differently from what it appeared on the books of the bank. If you find that in the making of the report of the resources and liabilities of the bank, the resources were inflated and stated to be larger than they appeared on the b-k's books, and the liabilities of the bank were also equally in-ted, above what they appeared on the bank's books, then you are instructed that such a statement is not material in such a sense as to affect the value or standing of the bank, for the reason that the liabilities of the bank are increased as much as the resources are increased; consequently the bank is in no better condition, and appeared to be in no better condition, where both sides are thus inflated, than it was had there been no inflation on either side of the bank's accounts.

Refused.

Excepted to by Def't directors & Walsh estate J. W. Deweese. S. H. Sornborger, Judge.

93 11. The jury are instructed that if you find that one or more of the defendants named in each of said cases have been guilty of negligence, misconduct and fraud, charged in said petitions in the several cases, that fact would not effect any one of

the other defendants, nor make such other defendants, or any one of them guilty of such negligence, misconduct and fraud.

In other words, although you may believe from the evidence that one of the defendants named had done and committed or neglected the things charged in the petitions in the different cases under the proof rendered, yet you are instructed that the negligence and misconduct and fraud of each defendant can be attributed to no one of the other defendants without proof that such other defendant, or defendants participated therein.

Refused.

Excepted to by Def't directors & Walsh estate, J. W. Deweese. S. H. Sornborger, Judge.

12. The jury *was* further instructed that proof that the president or cashier misappropriated or embezzled the funds of the bank, is not of itself sufficient to establish actionable negligence against directors who are not shown to have participated therein.

Refused.

Excepted to by Def't directors & Walsh, J. W. Deweese. S. H. Sornborger, Judge.

13. The jury are instructed that the law under which the said bank was organized and operated, provided for bank examiners to be appointed by the Comptroller of the Currency, whose duty it was to examine and make a full and detailed report of the condition of the bank to the Comptroller of the Currency, and the evidence shows in this case that such examinations of the bank were made
94 from time to time, by the regular government bank examiner, during the entire existence of the Capital National Bank.

Refused.

Excepted to by Def't directors & Walsh estate, J. W. Deweese. S. H. Sornborger, Judge.

14. The jury are instructed that the evidence in this case shows that the defendant Mosher was the real party in interest in the management and control of the Western Manufacturing Company; and if you believe from the evidence that he used the notes of the Company in borrowing money, or in endorsing such notes as President of the bank for rediscount, for his own interest and without the knowledge, consent or authority of the Board of Directors of the bank, then you are instructed that the bank would not be liable on such notes.

Refused.

Excepted to by Def't directors & Walsh Estate, J. W. Deweese S. H. Sornborger, Judge.

15. The jury are instructed that if you find that any notes were issued by the Western Manufacturing Company and endorsed and negotiated by defendant Mosher as President of the bank, then you are instructed that the bank would not be liable on any of such notes that were not duly and legally protested according to law; and the allowance of claims on such illegal notes by the Receiver of said bank is immaterial in the consideration of this case, and does not change the fact that the bank was not liable on the same.

Refused.

Excepted to by Def't Directors and Walsh estate. J. W. Deweese S. H. Sornborger, Judge.

95 16. The jury are instructed that in each of the above entitled cases the cause of action in each, so far as the published reports are concerned, is based upon the two reports set out in the petitions, to-wit: the report of December 28, 1886, and the report of December 9, 1892.

Refused.

Excepted to by Def't Directors & Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

17. The jury are further instructed that if any liability ever existed against any of the defendants on account of the making and publishing of the report of December 28, 1886, such liability is barred by the statutes of limitations, and no recovery can be had in this action on account thereof.

Refused.

Excepted to by Def't directors and Walsh estate. J. W. Deweese S. H. Sornborger, Judge.

18. The jury are instructed that in considering the various charges and allegations made against each defendant in the several cases submitted to you, you are not to arrive at any conclusion or determine any fact by mere conjecture or speculation; and you are further instructed that the burden of proof is upon the plaintiff to establish the facts alleged against any defendant in these several actions; and you must determine such facts from the evidence relating to such charges and facts, and not determine the same by inference, conjecture or guess-work.

Refused.

Excepted to by Def't Directors and Walsh Estate. S. H. Sornborgor, Judge.

96–101 19. The jury are instructed that Homan J. Walsh, who was vice-president of the said bank, never signed any of the reports to the Comptroller which was published in the newspapers; and you are therefore instructed to find a verdict in his favor, as he is not liable for anything stated in such reports.

Refused.

Excepted to by Defendant directors & Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

20. The jury are instructed that in considering the various charges and allegations made against each defendant in the several cases submitted to you, you are not to arrive at any conclusion or determine any fact by mere conjecture or speculation; and you are further instructed that the burden of proof is upon the plaintiff to establish the facts alleged against any defendant in these several actions; and you must determine such facts by the positive proof relating to such charges and facts, and not determine the same by inference, conjecture or guess work.

Refused.

Excepted to by Def't Directors & Walsh Estate, J. W. Deweese. S. H. Sornborger.

* * * * * * *

102 And afterwards, on the 19th day of June, 1902, there was filed of record in the office of said Clerk, the following, to-wit:

In the District Court of Seward County, Nebraska.

UTICA BANK
vs.
CHARLES W. MOSHER ET AL

1. The jury are instructed in this case that the defendants are not jointly liable to the plaintiff, and each defendant has made a separate defense to the claim made in the plaintiff's petition.

You are instructed that under the issues in this case and the evidence that has been adduced on the trial thereof, the plaintiff is not entitled to recover a verdict against the defendant Elizabeth Hamer, administratrix of the estate of Ellis P. Hamer, deceased; and you are therefore instructed to return a verdict in favor of the said defendant Elizabeth Hamer, administratrix of the Estate of Ellis P. Hamer, deceased.

Refused.

Excepted to by Def't Hamer, Admi'x. J. W. D. S. H. Sornborger, Judge.

And afterwards, on the 19th day of June, 1902, there was filed of record in the office of said Clerk, the following, to-wit:

103–111 UTICA BANK
vs.
CHARLES W. MOSHER ET AL.

1. The jury are instructed in this case that the defendants are not jointly liable to the plaintiff, and each defendant has made a separate defense to the claim made in the plaintiff's petition.

You are instructed that under the issue in this case and the evidence that has been adduced on the trial thereof, the plaintiff is not entitled to recover a verdict against the defendant Charles E. Yates; and you are therefore instructed to return a verdict in favor of the said defendant Charles E. Yates.

Refused.

Excepted to by Def't Yates, J. W. D. S. H. Sornborger, Judge.

* * * * * * *

112 And afterwards, on the 20th day of June, 1902, there was filed of record in the office of said Clerk a certain Motion in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF UTICA
vs.
CHARLES W. MOSHER ET AL.

Motion for New Trial.

Now comes the defendant Charles E. Yates, and moves the court to set aside the verdict rendered by the jury against him in the above entitled cause and grant a new trial therein, for the following reasons:

1st. That said cause of action had been duly and legally removed to the federal court, on account of the federal questions involved, as shown in the plaintiff's petition; and this court had no jurisdiction or power under the law to proceed further with the trial of said cause.

2nd. The court erred in the admission of any testimony over the objections of this defendant, for the reason that under the cause of action set forth in the plaintiff's petition, being one to recover damages on account of the negligence, misconduct and mismanagement of the bank on the part of the defendant'- director, the plaintiff is not, as a matter of law, entitled to recover.

3d. The damages alleged in the plaintiff's petition, if any existed on account of the charges made in said petition, could only
113 be recovered by the bank or by the Receiver, and ratably distributed among all the creditors and stockholders of said bank, and could not be recovered by the plaintiff for itself individually.

4th. The court erred in taking jurisdiction of said cause and the hearing of proof under the allegations of the plaintiff's petition over the objection of this defendant, for the reason that the duties and liabilities of this defendant as director of the Capital National Bank are governed and controlled by the national banking act, under which said bank was organized, and for which this defendant was acting in the capacity of director; and the damage growing out of the mismanagement negligence or fraud of this defendant as charged in said petition, if the same existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the national banking act and the liabilities of said defendant as director under said act as a director of said bank.

5th. The petition in said cause does not state a cause of action against this defendant.

6th. For errors of law occurring at the trial and excepted to by this defendant.

7th. The verdict is contrary to law.

8th. The verdict is contrary to the evidence and is not supported by sufficient evidence.

9th. The court erred in refusing to give instruction numbered 1, requested by this defendant.

10th. The court erred in refusing to give instruction numbered 3, requested by this defendant.

11th. The court erred in refusing to give instruction numbered 4, requested by this defendant.

114 12th. The court erred in refusing to give instruction numbered 5, requested by this defendant.

13th. The court erred in refusing to give instruction numbered 6, requested by this defendant.

14th. The court erred in refusing to give instruction numbered 7, requested by this defendant.

15th. The court erred in refusing to give instruction numbered 8, requested by this defendant.

16th. The court erred in refusing to give instruction numbered 9, requested by this defendant.

17th. The court erred in refusing to give instruction numbered 10, requested by the defendant.

18th. The court erred in refusing to give instruction numbered 11, requested by this defendant.

19th. The court erred in refusing to give instruction numbered 12, requested by this defendant.

20th. The court erred in refusing to give instruction numbered 13, requested by this defendant.

21st. The court erred in refusing to give instruction numbered 14, requested by this defendant.

22nd. The court erred in refusing to give instruction numbered 15, requested by this defendant.

23d. The court erred in refusing to give instruction numbered 16, requested by this defendant.

24th. The court erred in refusing to give instruction numbered 17, requested by this defendant.

25th. The court erred in refusing to give instruction numbered 18, requested by this defendant.

26th. The court erred in refusing to give instruction numbered 19, requested by this defendant.

27th. The court erred in refusing to give instruction numbered 20, requested by this defendant.

115 28th. The court erred in giving the third instruction on its own motion, to the jury, numbered 3.

29th. The court erred in giving the second fourth instruction on its own motion to the jury, numbered 4.

30th. The court erred in giving the fifth instruction on its own motion, to the jury, numbered 5.

31st. The court erred in giving the sixth instruction on its own motion, to the jury, numbered 6.

32nd. The court erred in giving the seventh instruction on its own motion, to the jury, numbered 7.

33d. The court erred in giving the eighth instruction on its own motion, to the jury, numbered 8.

34th. The court erred in giving the ninth instruction on its own motion, to the jury, numbered 9.

35th. The court erred in giving the tenth instruction on its own motion, to the jury, numbered 10.

36th. The court erred in giving the eleventh instruction on its own motion, to the jury, numbered 11.

37th. The court erred in giving the twelfth instruction on its own motion, to the jury, numbered 12.

38th. The court erred in giving the thirteenth instruction on its own motion, to the jury, numbered 13.

39th. The court erred in giving the fourteenth instruction on its own motion, to the jury numbered 14.

40th. The court erred in giving the fifteenth instruction on its own motion, to the jury, numbered 15.

41st. The court erred in giving the sixteenth instruction on its own motion, to the jury, numbered 16.

42d. The court erred in giving the seventeenth instruction on its own motion, to the jury, numbered 17.

43d. The court erred in giving the eighteenth instruction on its own motion, to the jury, numbered 18.

116–119 44th. The court erred in giving the nineteenth instruction on its own motion, to the jury, numbered 19.

45th. The court erred in giving the twentieth instruction on its own motion, to the jury, numbered 20.

46th. The court erred in giving the Twenty-First instruction on its own motion, to the jury, numbered 21.

47th. The court erred in giving the first instruction requested by pl'ffs to the jury, numbered 1st.

48th. The court erred in giving the second instruction requested by plaintiffs, to the jury, numbered 2d.

J. W. DEWEESE,
Att'ys for said Def't.

* * * * * * *

120 And afterwards, on the 20th day of June, 1902, there was filed of record in the office of said Clerk a certain Motion in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

BANK OF UTICA
vs.
CHARLES W. MOSHER ET AL.

Motion for New Trial.

Now comes the defendant Louisa Hamer, administratrix, and moves the court to set aside the verdict rendered by the jury against her in the above entitled cause and grant a new trial therein, for the following reasons:

121 1st. That said cause of action had been duly and legally removed to the federal court, on account of the federal question involved, as shown in the plaintiff's petition; and this court had no jurisdiction or power under the law to proceed further with the trial of said cause.

2nd. The court erred in the admission of any testimony over the objection of this defendant, for the reason that under the cause of action set forth in the plaintiff's petition, being one to recover damages on account of the negligence, misconduct and mismanagement of the bank on the part of this defendant's intestate the plaintiff is not, as a matter of law, entitled to recover.

3d. The damages alleged in the plaintiff's petition, if any existed on account of the charges made in said petition, could only be recovered by the bank or by the Receiver, and ratably distributed among all the creditors and stockholders of said bank, and could not be recovered by the plaintiff for itself individually.

4th. The court erred in taking jurisdiction of said cause and the hearing of proof under the allegations of the plaintiff's petition over the objection of this defendant, for the reason that the duties and liabilities of this defendant's intestate as director of the Capital National Bank are governed and controlled by the national banking act, under which said bank was organized, and for which this defendant's intestate was acting in the capacity of director; and the damages growing out of the mismanagement negligence or fraud of this defendant's intestate charged in said petition, if the same existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the national banking act and the liabilities of said defendant's intestate under said act as a director of said bank.

122 5th. The petition in said cause does not state a cause of action against this defendant.

6th. For errors of law occurring at the trial and excepted to by this defendant.

7th. The verdict is contrary to law.

8th. The verdict is contrary to the evidence and is not supported by sufficient evidence.

9th. The court erred in refusing to give instruction numbered 1, requested by this defendant.

10th. The court erred in refusing to give instruction numbered 3, requested by this defendant.

11th. The court erred in refusing to give instruction numbered 4, requested by this defendant.

12th. The court erred in refusing to give instruction numbered 5, requested by this defendant.

13th. The court erred in refusing to give instruction numbered 6, requested by this defendant.

14th. The court erred in refusing to give instruction numbered 7, requested by this defendant.

15th. The court erred in refusing to give instruction numbered 8, requested by this defendant.

16th. The court erred in refusing to give instruction numbered 9, requested by this defendant.

17th. The court ered in defusing to give instruction numbered 10, requested by this defendant.

18th. The court erred in refusing to give instruction numbered 11, requested by this defendant.

19th. The court erred in refusing to give instruction numbered 12, requested by this defendant.

20th. The court erred in refusing to give instruction numbered 13, requested by this defendant.

21st. The court erred in refusing to give instruction num-
123 bered 14, requested by this defendant.

22d. The court erred in refusing to give instruction numbered 15, requested by this defendant.

23d. The court erred in refusing to give instruction numbered 16, requested by this defendant.

24th. The court erred in refusing to give instruction numbered 17, requested by this defendant.

25th. The court erred in refusing to give instruction numbered 18, requested by this defendant.

26th. The court erred in refusing to give instruction numbered 19, requested by this defendant.

27th. The court erred in refusing to give instruction numbered 20, requested by this defendant.

28th. The court erred in giving the third instruction on its own motion, to the jury, numbered 3.

29th. The court erred in giving the second fourth instruction on its own motion, to the jury, numbered 4.

30th. The court erred in giving the fifth instruction on its own motion, to the jury, numbered 5.

31st. The court erred in giving the sixth instruction on its own motion, to the jury, numbered 6.

32d. The court erred in giving the seventh instruction on its own motion, to the jury, numbered 7.

33d. The court erred in giving the eighth instruction on its own motion, to the jury, numbered 8.

34th. The court erred in giving the ninth instruction on its own motion, to the jury, numbered 9.

35th. The court erred in giving the tenth instruction on its own motion, to the jury, numbered 10.

36th. The court erred in giving the eleventh instruction on its own motion, to the jury, numbered 11.

124 & 125 37th. The court erred in giving the twelfth instruction on its own motion, to the jury, numbered 12.

38th. The court erred in giving the thirteenth instruction on its own motion, to the jury, numbered 13.

39th. The court erred in giving the fourteenth instruction on its own motion, to the jury, numbered 14.

40th. The court erred in giving the fifteenth instruction on its own motion, to the jury, numbered 15.

41st. The court erred in giving the sixteenth instruction on its own motion, numbered 16.

42d. The court erred in giving the seventeenth instruction on its own motion, numbered 17.

43d. The court erred in giving the eighteenth instruction on its own motion, to the jury, numbered 18.

44th. The court erred in giving the nineteenth instruction, on its own motion, to the jury, numbered 19.

45th. The court erred in giving the twentieth instruction on its own motion, to the jury, numbered 20.

46th. The court erred in giving the twenty-first instruction on its own motion, to the jury, numbered 21.

47th. The court erred in giving the first instruction requested by pl'ffs, to the jury, numbered 1st.

48th. The court erred in giving the second instruction requested by pl'ffs to the jury, numbered 2d.

J. W. DEWEESE,
Att'y for Def't Hamer.

* * * * * * *

126 And afterwards, on the 21st day of July, A. D. 1902, there was had herein the following order of Court, to-wit:

In the District Court of Seward County, Nebraska.

No. 1795.

THE UTICA BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Be it remembered, that on this 21st day of July, A. D., 1902 it being a day in the regular May 1902 term of the District Court, this cause came on for hearing on the motion of the defendant George M. Walsh and Warren W. Walsh as administrators of the estate of Homan J. Walsh, deceased, for judgment in their favor on the special findings of the jury, notwithstanding the general verdict of the jury against them. And the court being fully advised in the -remises sustains said motion, to which the plaintiff excepts.

And thereupon and on said same day this cause came on further to be heard on the separate motions for new trial of defendants, Charles E. Yates, Charles W. Mosher, Richard C. Outcalt and Louisa Hamer as executrix of the last will and testament of Ellis P. Hamer, deceased, and the same being argued and submitted to the Court, and the Court being fully advised in the premises, on consideration thereof does overrule each and all of said defendants' motions for new trial, to which said defendants severally except.

It is therefore considered and adjudged by the Court that the defendants George M. Walsh and Warren W. Walsh as administrators of the estate of Homan J. Walsh, deceased, go hence without day. It is therefore considered and adjudged that said defendants Walsh as administrators &c. recover judgment against plaintiff for his costs.

127 It is further considered and adjudged that the plaintiff recover from the defendants Charles E. Yates, Charles W. Mosher, Richard C. Outcalt and Louisa Hamer as executrix of the last will and testament of Ellis P. Hamer, deceased, and each of

them, jointly and severally the sum of $8292.92 with 7% interest from this date, and costs herein taxed at $——.

Defendants are allowed forty days from the rising of the Court in which to settle bill of exceptions.

It is further ordered that no execution issue on this judgment until after sixty days from this date.

And afterwards, on Aug. 4, 1902, the following Motion was made herein, to-wit:

In the District Court of Seward County, Nebraska.

UTICA BANK
vs.
C. W. MOSHER ET AL.

Now comes the defendants and move the court to correct the verdict rendered in the above entitled cause, and to correct the judgment rendered therein, so far as the same relates to the amount of recovery, and in this case to correct the judgment so that the amount of the judgment with interest to April 21, 1902, will be the sum of $7,121.85 for the reasons:

1st. That amount of the verdict was not determined by the jury but was simply furnished to the jury by the plaintiff's counsel and the court, subject to be corrected afterward, according to the fact, if the same was wrong, as set forth in the affidavit hereto
128 attached and made part hereof.

J. W. DEWEESE &
H. F. ROSE,
Att'ys for Def'ts Thompson, Yates, and Hamer.

In the District Court of Seward County, Nebraska.

UTICA BANK
vs.
C. W. MOSHER ET AL.

STATE OF NEBRASKA, *Lancaster County, ss:*

H. F. Rose and J. W. Deweese being duly sworn, say that they were attorneys for the defendants in the above entitled cause.

That counsel for the plaintiff asked the court to instruct the jury that if they found for the plaintiff to return a verdict in favor of the plaintiff for the amount which the plaintiff had figured up as the correct amount in case the jury decided for the plaintiff. As the correct figuring of the amount of this verdict on which judgment should be rendered, involved a good deal of work and time, it was announced in open court by the court in the presence of the jury and to the attorneys on both sides of the controversy, that he himself would write *in* the amount which the plaintiff had furnished as

the correct amount, into the verdict for the jury to return in case they found for the plaintiff, and that such amount could be corrected or changed later on if it was incorrect, and after the defendants had had time and opportunity to figure over the claims, with interest, and the credits to be deducted, and determine whether the amount so furnished by the plaintiff's counsel to the court was correct or not.

Affiants further say that they have had no sufficient time to make the proper figuring of the amount that should be entered
129 into the verdict; but they have had the claims with credits and interest, carefully and properly figured since, and find that the amount entered in the verdict in this case is incorrect and excessive, and that judgment was entered by the court on July 21, 1902, on the verdict rendered for $8,292.92, whereas the true amount that the plaintiff would be entitled to recover, if at all, with interest at 7%, was and is the sum of $7,121.85.

H. F. ROSE.
J. W. DEWEESE.

Sworn to before me and subscribed to in my presence by J. W. Deweese and H. F. Rose this Aug. 2, 1902.

WM. B. KERBY,
Notary Public.

And afterwards, on September 24th, 1902, there was filed with the Clerk of said Court, Bill of Exceptions herein, consisting of Vol. I, Vol. II, Vol. III, the same being herewith transmitted.

And afterwards, on the 22nd day of October, being a day in the regular May, 1902, term of said District Court the following Order of the Court was had herein, to-wit:

In the District Court of Seward County, Nebraska.

JONES NATIONAL BANK
v.
MOSHER ET AL.

STAPLEHURST BANK
v.
MOSHER and Others.

UTICA BANK
v.
MOSHER and Others.

BAILEY
v.
MOSHER and Others.

130 *Order for Remittitur.*

It having been made to appear by Computations that the verdicts heretofore found by the jury in the above several cases *was* & are

each excessive, and that the true sums due upon *each* several claims, with interest were severally, as follows:

To the Jones National Bank	$16,444.63
" " Staplehurst Bank	13,163.54
" " Utica Bank	8,111.29
" " Thomas Bailey	9,682.37

And counsel for all the parties in said causes having agreed that the foregoing are true computations, severally, and should be substituted, in the place of the *same* ascertained by the jury & included in the several verdicts, Now therefore,

It is ordered that plaintiffs may and they are hereby ordered to file a remittitur in each of said several cases, of the difference between the amount, severally, above stated and the amount named in the verdict, and that thereupon the Clerk may enter judgment, in pursuance of the verdict, in each of said cases for the amount- above severally set forth.

S. H. SORNBORGER, *Judge.*

There was also entered of record of the same day the following Journal Entry, to-wit:

In the District Court of Seward County, Nebraska.

No. 1795.

THE UTICA BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Be it remembered, that on this 22nd day of October, 1902, being a day in the regular May, 1902, term of the District Court, this cause came on for hearing on the motion of Charles E. Yates and Louisa Hamer as executrix of the last will and testament of Ellis P. Hamer, to correct and amend the judgment heretofore entered in this cause. 131–134

And it appearing to the Court that the amount of the verdict and judgment in this cause is excessive, and that the amount thereof should be reduced from $8,292.92 to $8,111.29, and the plaintiff appearing in open court and consenting to said remittitur.

It is therefore ordered and adjudged that the amount of said judgment be and is hereby reduced to $8,111.29, and that as thus modified the said judgment be and is hereby affirmed, and execution is awarded therefor.

And afterwards, on November 13th, 1902, there was filed herein a certain Remittitur, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

Remittitur.

THE UTICA BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

The verdict in this cause for the sum of $8,292.92, as returned by the jury, being excessive in the sum of $181.62, and the plaintiff having been ordered and permitted by the Court to enter remittitur in that amount.

The plaintiff therefore hereby remits from the verdict as returned by the jury the sum of $181.63, so that the verdict in its favor may be reduced to the sum of $8111.29 in accordance with the order of the Court.

THE UTICA BANK,
By R. S. NORVAL,
J. J. THOMAS, *Its Att'ys.*

* * * * * * *

135 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Motion in words and figures following, to-wit:

In the Supreme Court, State of Nebraska.

CHARLES E. YATES and LOUISA HAMER, Administratrix, Plaintiffs in Error,
vs.
UTICA BANK and THOMAS BAILEY, Defendants in Error,

and

DAVID E. THOMPSON, Plaintiff in Error,
vs.
BANK OF STAPLEHURST and THE JONES NATIONAL BANK, Defendants in Error.

Now comes the plaintiffs in error in each of the above cases and moves the court to make an order on the Clerk of this court directing said Clerk to file the bill of exceptions in said cases consisting of three volumes, not only in the above entitled cases but also in the cases as follows:

Charles E. Yates *vs.* Jones National Bank, Charles E. Yates *vs.* The Bank of Staplehurst, Charles E. Yates *vs.* Thomas Bailey, Louisa Hamer, administratrix *vs.* Thomas Bailey, Louisa Hamer, administratrix *vs.* The Jones National Bank, Louisa Hamer,
136 administratrix *vs.* Utica Bank, David E. Thompson *vs.* Bank of Staplehurst, David E. Thompson *vs.* Jones National Bank,

for the reason that all of said cases were tried at one time, before the same court, and the same jury, on the same evidence as shown in the Bill of Exceptions by direction of the trial court and in accordance with the stipulation of the parties, to said cases, as follows:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

THE JONES NATIONAL BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

UTICA BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Stipulation.

The parties to this stipulation in each of the above entitled causes which are now pending in the District Court of Seward County, Nebraska, hereby stipulate and agree that all of said causes shall be tried in the District Court at one and the same time, and that the evidence proper and applicable in any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, subject of course to the objections of either of the parties to this stipulation and governed by the ruling of the court, shall be offered and produced and the cases respectively disposed of by court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence insofar as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation, shall be considered by the jury in such case in the disposi-
137 tion thereof; such evidence being properly applied to any one or to all of the parties to this stipulation as the facts of the court may warrant.

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties

represented in this stipulation in such case may be received and that then the whole evidence as thus introduced shall be properly applied to each respective case and to each respective party thereto under the rulings and directions of the court, subject to the objections of either party.

It is therefore agreed that if either party or any party to any of said causes represented in the stipulation shall desire to prosecute error from the judgment of the District Court in any or all of said cases, a transcript of the testimony given on the trial of all of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one Bill of Exceptions and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases, and that the Bill of Exceptions settled in one case shall be the Bill of Exceptions in each and all of said cases.

In Witness Whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,
J. J. THOMAS,
Attorneys for Plaintiffs.
H. F. ROSE AND
J. W. DEWEESE,
Attorneys for D. E. Thompson.
138 J. W. DEWEESE,
Att'y for Def'ts Yates, Walsh Estate & Hamer Estate.
CHAS. O. WHEDON,
Attorney for Chas. W. Mosher and R. C. Outcalt.

H. F. ROSE AND
J. W. DEWEESE,
Att'ys for Pl'ffs in Error.

Endorsed: C. E. Yates Pl'ff in Error *vs.* Utica Bank, *et al.*, 13030 13031–32 and 33. Charles E. Yates, *et al.*, *vs.* Jones Nat. Bank *et al.*. Motion *in re* Bill of Exceptions. Supreme Court of Nebraska. Filed Nov. 28 1902. Lee Herdman Clerk.

And afterwards, to-wit, on the 2nd day of December, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Order in the words and figures following, to-wit:

No. 13030.

CHARLES E. YATES, LOUISA HAMER, Administratrix, and DAVID E. THOMPSON, Plaintiffs in Error,

v.

THE JONES NATIONAL BANK, Defendants in Error.

No. 13031.

CHARLES E. YATES, LOUISA HAMER, Administratrix, ET AL., Plaintiffs in Error,

v.

UTICA BANK, Defendant in Error.

139–199 No. 13032.

CHARLES E. YATES, LOUISA HAMER, Administratrix, ET AL., Plaintiffs in Error,

v.

THOMAS BAILEY, Defendant in Error.

No. 13033.

CHARLES E. YATES, LOUISA HAMER, Administratrix, and DAVID E. THOMPSON, Plaintiffs in Error,

v.

THE BANK OF STAPLEHURST, Defendant in Error.

Now on this 2nd day of December, 1902, the motion filed by the several plaintiffs in error in each one of the above entitled causes of action, came on for hearing, and on due consideration the Court sustains the said motion in each of the causes.

It is, therefore, ordered and adjudged that the Clerk be ordered and is hereby directed to file the one bill of exceptions resulting from the trial of said several causes in each of said several causes to be for the use and benefit of each of the said several plaintiffs in error as the original bill of exceptions in each one of said causes.

It is further ordered that the stipulation made by and between the parties to the said several suits for the trial of said several causes at one time before one jury and for the use of one bill of exceptions if either party desired to have the judgment of the lower court reviewed, shall be and is hereby ordered to be considered as a part of the bill of exceptions, although it is attached in fact to the Clerk's transcript of the record, in the disposition of the said several causes, shall be used and considered a part of the bill of exceptions.

200 And afterwards, to-wit, on the 17th day of November, 1903, the following among other proceedings were had and done, to-wit:

The following causes were argues and submitted.

No. 13031. Yates *v.* Utica Bank, Error to Seward County.

And afterwards, to-wit, on the 17th day of March, 1904, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Order in words and figures following, to-wit:

No. 13031.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
THE UTICA BANK ET AL., Defendants in Error.

Error to the District Court of Seward County.

Upon motion of the Court, this cause will be called for further argument of counsel April 19, A. D. 1904.

And afterwards, to-wit, o nthe 19th day of April, 1904, the following among other proceedings were had and done, to-wit:
The following causes were reargued and submitted to the Court.

No. 13031. Yates *v.* Utica Bank. Error to Seward County.

And afterwards, on the 19th day of October, 1905, there was rendered by said Supreme Court and entered of record upon
201 Journal thereof a certain judgment in the words and figures following to-wit:

CHARLES E. YATES ET AL., Plaintiffs in Error,
v.
THE UTICA BANK, Defendant in Error.

Error to the District Court of Seward County. No. 13031.

This cause coming on to be heard upon proceedings in error to the district court of Seward County, was argued by counsel and submitted to the court; upon full consideration whereof, the court doth find no error apparent in the record of the proceedings and judgment of said district court, and it is therefore considered, ordered and adjudged that the judgment of said district court be, and the same hereby is affirmed; that defendant in error pay all costs incurred herein by it at $—, and have and recover from plaintiff in error all its costs so expended herein; that plaintiffs in error pay all costs incurred herein by them, taxed at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.
And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Opinion, by said Court, pursuant to which the preceding judgment was rendered, which Opinion is in the words and figures following, to-wit:

202 No. 13030.

YATES
v.
JONES NATIONAL BANK.

No. 13031.

YATES
v.
THE UTICA BANK.

No. 13032.

YATES
v.
BAILEY.

No. 13033.

YATES
v.
THE BANK OF STAPLEHURST.

Opinion. Filed October 19, 1905.

Commissioner's Opinion, Department No. 2.

1. Damages resulting to a national bank, from the misfeasance or mismanagement of its officers, are assets of the bank and are recoverable only in an action brought by the bank or for the benefit of all the stockholders and creditors thereof.
2. The officers of a national bank are personally liable for false reports made and published by them, in pursuance of Sec. 5211, Rev. Stat. U. S., to the party injured thereby and the right of the injured party to maintain the action does not rest on the federal statute but the common law.
3. It is no defense to an action of that character that such reports were made and published by the officers without knowledge of their falsity. Following Gerner *v.* Mosher, 58 Nebr., 135.
4. A cause of action, once finally determined between the parties on the merits, can not afterward, so long as such judgment remains in force, be litigated by new proceedings, either before the same or some other tribunal.
5. The foregoing rule applies, not only to judgments which are the result of a trial of issues of fact, but also to judgments on demurrer, where such judgments go to the merits of
203 the case; but a judgment on a demurrer, which is based on a technical defect of pleading, lack of jurisdiction, or the like, does not involve the merits of the controversy, and will not support the plea of *res judicata.*

6. The voluntary dismissal of an action, before final submission, does not operate as an estoppel, and is without prejudice to a future action.
7. Under our practice the common law rule, making the payment of costs in the action dismissed a prerequisite to the prosecution of another, is one which the trial court in the exercise of a sound discretion may or may not apply.
8. Evidence examined, and held sufficient to sustain the findings of the jury.

204 ALBERT, *C.*:

In 1893, the Jones National Bank and the Bank of Staplehurst each brought an action against Charles W. Mosher, Homer E. Walsh, David E. Thompson, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt and Rollo O. Phillips; and Thomas Bailey and the Utica Bank, each brought an action against all of the said defendants except David E. Thompson. The actions were brought in the district court of Lancaster county, and the several petitions so far as the present inquiry is concerned are substantially the same, and the allegations are, in effect, as follows: That from the 9th day of December, 1886, to the 21st day of January, 1893, the Capital National Bank, of Lincoln, was a corporation duly organized, existing under and by virtue of the banking laws of the United States, that the defendants were the directors and officers thereof, and, as such, had exclusive control and management of its affairs. That during the whole of said period the Bank was insolvent, as the defendants well knew, or, by the exercise of due diligence would have known, and, that on or about the 23rd day of January, 1893, it passed into the hands of a receiver, who, at the commencement of the action, was in possession of all of its assets. That from the 9th day of December, 1886, to the date such bank passed into the hands of the receiver, the defendants, in pursuance of the banking laws of the United States and on the demand of the comptroller of the currency, from time to time made statements, and caused and permitted statements to be made, to the comptroller of the currency purporting to show the financial condition of such bank at the time such statements were respectively made, and caused such statements to be published in certain newspapers of general circulation in this state. That the defend-
205 ants, although chargeable with knowledge of the true condition of said bank, and that it was not in a prosperous condition, but insolvent when such reports were respectively made, for the purpose of deceiving the plaintiff and others and thereby inducing them to deposit their money in said bank, made out and caused said statements to be made in such a way as to show that the bank was in a prosperous condition and that it was safe and solvent. That such statements were brought to the notice of the plaintiff, and, that relying thereon and believing them to be true, the plaintiff, induced thereby, made certain deposits in the said bank before it passed into the hands of the receiver. That if each of the defendants did not have actual knowledge of the false and fraudulent

character of such statements, and of the actual condition of the bank when such statements were made, his lack of knowledge was the result of his gross negligence in respect to his duties as an officer of the bank. Then follow allegations to the effect that the defendants, as officers of such bank, had loaned sums of money and had allowed and paid dividends to its stockholders while the bank was insolvent, contrary to and in violation of the banking laws of the United States. The concluding allegations are as follows:

"* * * and by reason of the several violations of the banking law as above set forth by the several defendants they have become and are liable to this plaintiff for the damages he has sustained by reason of their acts in the sum of $11,500, together with interest thereon from the 11th day of October to the 28th day of December, 1892, at the rate of seven per cent per annum."

In each case the defendants demurred on four grounds: (1) Want of jurisdiction of subject matter. (2) Plaintiff's want of legal capacity to sue. (3) Defect of parties plaintiff. (4) Insufficiency of the facts stated to constitute a cause of action.

206 The defendants also filed petitions, asking the removal of the causes to the federal court, for the reason that the actions involved a construction of the National Banking Act. The causes, were removed, and thereupon the plaintiff filed motions in the federal court, asking that the causes be remanded, for the reason that they involved no federal question. The motion was overruled.

In the action brought by the plaintiff Bailey the federal court sustained the demurrer to his petition and dismissed the case. Bailey prosecuted error to the Circuit Court of Appeals, when the rulings of the lower court on the motion to remand and the demurrer to the petition were sustained, and the judgment of dismissal was affirmed (Bailey *v.* Mosher, 63 Fed., 488) whereupon the other plaintiffs dismissed their actions.

Thereafter, the plaintiffs each brought an action against the parties they had respectively made defendants before, in the district court of Seward county. The petitions, in the latter cases, as they stood at the time of the trial, are substantially the same as those in the former, save that it is not alleged in the latter that the Capital National Bank was organized under the laws of the United States, nor that the statements therein mentioned, purporting to show the financial condition of said bank, was made in pursuance of the banking laws of the United States or on the demand of or to the comptroller of the currency. The concluding of the latter petitions *are* as follows:

"Plaintiff states that by reason of the facts as above set forth and the false and fraudulent statements, advertisements, and representations of the defendants the plaintiff has been damaged in the sum of Twenty Thousand ($20,000) Dollars."

On the application of the defendants, the case of Bailey *v.* Mosher, *et al.* was removed to the U. S. Circuit Court, on the

207 theory that it was brought under the United States Banking Act for misfeasance or mismanagement of the defendants, as

officers of a national bank. On motion of the plaintiff, the Circuit court remanded the cause to the state court, holding that no federal question was involved. Bailey *v.* Mosher, *et al.,* 74 Fed., 15.

When the cause again reached the state court, the several petitions were amended by interlineation, whereby they were brought to their present form. Whereupon on application of the defendants, the cases were removed to the U. S. Circuit Court, on the theory that the amendment had injected a federal question. The Circuit Court overruled a motion to remand, sustained a demurrer to the petition and dismissed the cause. Bailey *v.* Mosher, *et al.,* 95 Fed., 223. On appeal, the question was presented to the Circuit Court of Appeals, the judgment of the Circuit Court was reversed and the causes remanded to the state court, for the reason that they involved no federal question. Jones *v.* Mosher, *et al.,* 107 Fed., 561.

The subsequent pleadings are somewhat voluminous, and it will suffice to say that the questions hereinafter discussed are sufficiently presented. The defendant Stuart made default and judgment was taken against him. The defendants Hamer and Phillips died after the action was commenced; as to the former the action was revived against his estate; as to the latter no proceedings for revivor were had.

The cases were all tried at the same time and submitted on the same evidence. At the close of the evidence the court directed a verdict in each case in favor of the defendant Walsh. As to the other defendants, in the several cases, to which they were respectively parties, the jury found for the plaintiff and judgment was given accordingly, from which the defendants respectively prosecute
208 error to this court. One of the principal contentions of the defendant- reduced to its simplest form, is as follows: (1) Damages resulting to a national bank, from the misfeasance or mismanagement of its officers are assets of the bank, and are recoverable of such officers, only in an action brought by the bank, or for the benefit of all of the stockholders and creditors. (2) The damages alleged in the petition resulted to a national bank from the misfeasance and mismanagement of its officers. (3) Therefore, such damages are assets of the bank, and are recoverable only in an action brought by the bank, or for the benefit of all the stockholders and creditors.

The major premise is so nearly a self evident proposition that it requires no elaboration. It is recognized in Bailey *v.* Mosher, *supra,* and in the cases there cited. But we are not disposed to accept the minor premise. It is true, the petitions show misfeasance and mismanagement on the part of the defendants, as officers of the bank, and, that the bank thereby sustained damages, but they show more than that. They show that the defendants made and published false and misleading statements concerning the financial condition of the bank, whereby the plaintiffs were induced to become and remain its creditors to their damage. In short, whatever other allegation may be contained in the petition-, they also contain sufficient to constitute a common law action for deceit. That the party, upon whom the deceit or imposition was practiced by the officers of

a national bank, may maintain an action against them in his own name and behalf for damages resulting to him therefrom, and that his right of action does not rest on the federal statutes but the common law, is no longer an open question. Stewart *v.* Bank, 57 Nebr., 576; Gerner *v.* Mosher, 58 Nebr., 135; 61 *id.*, 100; Prescott *v.* Haughey, 65 Fed., 653; Gerner *v.* Thompson, 74 Fed.,
209 125; King *v.* Pomeroy, 121 Fed., 287; Briggs *v.* Spaulding, 141 U. S. 132.

But, it is contended, that the petitions are substantially the same as that in Bailey *v.* Mosher, *supra*, and that the Circuit Court of Appeals held that such petition committed the plaintiff to the theory that his action was for misfeasance and mismanagement, resulting in damages to the bank, recoverable only in an action by the receiver for the benefit of all the stockholders and creditors. The difference between the petition in that case and those in the cases at bar has already been pointed out, and the importance which the Circuit Court of Appeals attached to some of the allegations of the petition in that case, which are omitted from those now before us, is shown by the following taken from the body of the opinion:

"We feel constrained to hold that, properly construed, the petition contains but one paragraph or count, and states but one cause of action, and that the cause of action stated is one for the misfeasance and mismanagement of the affairs of the bank by the defendants *and* its officers and directors. We can not adopt the view of the plaintiff in error,—that those clauses of the petition which state, or tend to state, a cause of action for deceit at common law, should be segregated from the other clauses of the petition, and held to constitute the statement of the cause of action. The court can not reject the allegations of the petition which do state a cause of action under the banking act, for the purpose of converting mere matter of inducement or surplusage, contained elsewhere in the petition, into a substantive statement of a cause of action different from that which the petition in terms declares to be the foundation of the action. The plaintiff was not bound to state the legal effect of the facts set out in his petition, but, having done so, he can not complain if his adversary and the court accept and act upon his own theory. Especially is this so when the petition
210 is ambiguous, and will support that theory as well or better than any other.

"In the sense of the word, as used in code pleading, there is but one paragraph in this petition. The term 'paragraph' as used in code pleading, means an entire or integral statement of a cause of action. It is the equivalent of 'count' at common law. It may embrace one sentence or many sentences; but, whether one or many, it constitutes a statement of a single cause of action. It is a requirement of some codes that, if the petition contains 'more than one cause of action, each shall be distinctly stated in a separate paragraph and numbered,' (Code Arkansas, 5027) and all of them require that each cause of action shall be separately stated, and numbered. The Nebraska Code provides that 'where the petition contains more than one cause of action, each shall

be separately stated and numbered.' Consol. St. Neb., 1891, 4633 (93). And the Supreme Court of that state, construing this section, have said: 'A plaintiff can not jumble his causes of action together.' Bank *v.* Bollong, 24 Nebr., 821, 40 N. W., 411. If, in drafting the petition, the pleader supposed he was stating more than one cause of action, he would undoubtedly have separately stated and numbered them, as required by the Nebraska Code. No one can point out in this petition where the statement of one cause of action ends and another begins. The plaintiff can not amend or reform his petition in this court. If it were possible to spell out of the averments of this petition, taken separately or together, an action for deceit, the court would be precluded from attaching that meaning to them by the positive statement contained in the petition itself that the action is grounded on the 'violations of the banking law' therein set out. Section 5239 of the Revised Statutes of the United States provided that:

'If the directors of any national banking association shall
211 knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall thereby be forfeited. * * * And in cases of such violation, every director who participated in, or assented to, the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.'

It is obvious that the plaintiff, in the inception of this case, had in view the enforcement of the defendants' liability under the last clause of this section."

From the foregoing it is clear that the court proceeded upon the ground that the plaintiff, by those allegations of his petition, which are omitted from those in the cases at bar, had committed himself to the theory that his cause of action was one arising under the federal banking law for misfeasance and mismanagement, resulting in damages to the bank. Those very allegations, it held, precluded it from "spelling out" a cause of action for deceit. If those allegations are to be held of so much importance when included in a petition, it seems to us that their omission, and the studied omission of direct reference to the federal banking law, from the petitions in the cases at bar are equally significant. Besides, it was expressly held, in Jones *v.* Mosher, *et al.*, 107 Fed., 561, that the petition involved no federal question; consequently, it presented no case arising under the federal banking law. It, and the other petitions before us, do state a cause of action for deceit. We know of no rule of pleading that would justify this court in assuming that the plaintiff intended to plead a cause of action which he could not maintain, so long as

he has pleaded facts sufficient to constitute one which he
212 could maintain. It may be said in passing that in this state, no such meaning is attached to the term "paragraph," as that given by the Court of Appeals in that case.

It is further insisted, that the judgment rendered in that case supports the plea of *res judicata,* interposed against the plaintiff

Bailey in his present action. It is elementary that a cause of action, once finally determined between the parties on the merits, can not afterward, and so long as such judgment remains in force, be litigated by new proceedings, either before the same or any other tribunal. And this rule is not limited to judgments which are the result of a trial of an issue of fact, but applies as well to judgments on demurrer, where such judgments go to the merits of the case. Gould *v.* Evansville, etc. R. Co., 91 U. S., 526; Bissell *v.* Spring Valley Township, 124 U. S., 225; Angles *v.* Mellus, 59 Cal., 444; Gregory *v.* Woodworth, 107 Iowa, 151; Roadman *v.* Michigan Cent. R. Co., 59 Mich., 397. But a judgment on a demurrer which is based on a technical defect of pleading, a lack of jurisdiction, misjoinder of parties, or the like, does not involve the merits of the controversy and is not available as *res judicata*. House *v.* Mullen, 22 Wall., 42; Sivers *v.* Sivers, 97 Cal., 518; Roberts *v.* Hamilton, 56 Iowa, 683. When a plea of *res judicata* is interposed, the controlling question is, whether the judgment offered to support it is based on the merits of the controversy. If it is, it is conclusive and forecloses further investigation. Applying that test to the present case, we do not think the judgment of the court of Appeals, in Bailey *v.* Mosher, *supra*, supports the plea of *res judicata*. It does not dispose of the action for deceit on its merits, but on the technical ground that, by the averment of mere conclusions of law, the plaintiff had committed himself to the theory that the
213 action was of a different character, and precluded an examination of the merits of his action for deceit.

As to the other plaintiffs, it is insisted, that they are concluded by the judgments of dismissal, rendered in the respective cases by the federal court. It will be remembered, that in all of those cases, save that brought by Bailey, the dismissal was on the motion of the plaintiffs, and before the trial of any issue of law or fact. A dismissal, under such circumstances, does not operate as an estoppel, and is no bar to another action. Sec. 430, Code Civil Procedure, seems to embody the prevailing doctrine in regard to a voluntary dismissal, and provides, among other things, that an action may be dismissed by the plaintiff, before a final submission of the cause to the jury, without prejudice to a future action. See Beals *v.* Western T. U. Co., 53 Nebr., 601; Bank *v.* State, 56 *Ld.*, 188; Harrison *v.* Insurance Co., 80 N. W. (Ia.), 309. That the costs had not been paid in the cases voluntarily dismissed, does not estop the plaintiffs to prosecute these actions. So far as our practice is concerned, the most that can be said of the common law rule, making the payment of the costs in the former action a prerequisite to the prosecution of another, is, that it is one which the trial court, in the exercise of a sound discretion, may or may not apply. U. P. R. R. Co. *v.* Mertes, 35 Nebr., 204. The record shows no abuse of discretion in this instance.

It is next contended by the defendants that these causes were brought and prosecuted on the theory that they were actions for misfeasance and mismanagement. The record does not sustain that contention. It is true there is a large amount of evidence in the

record tending to establish misfeasance and mismanagement of the affairs of the bank by the defendants. But this evidence was not introduced for the purpose of proving such facts, but was, in most instances, inseparably connected with evidence tending
214 to establish an action for deceit. That the court tried the cases as actions for deceit, is clearly shown, we think, by an instruction following the statement of the issues, in which the jury were instructed, that the burden of proof was on the plaintiffs to establish the allegations contained in their several petitions closing with these words: "In other words, the burden is upon the plaintiffs severally to show, that the defendants severally published, or caused to be published, or participated in the publication of the statements of the condition of the Capital National Bank * * * that the plaintiffs, each for himself, relied upon the truth of said statements; * * * that such statements were untrue * * *"

It is earnestly contended by the defendants, that the verdicts are not sustained by sufficient evidence. The evidence makes up three large volumes, and it is impossible to discuss it, save in the most general way, without extending this opinion to undue length.

It was incumbent on the plaintiffs to establish by a preponderance of the evidence, (1) That the defendants published the statements purporting to show the financial condition of the Capital National Bank or participated in the publication thereof; (2) That such statements were false; (3) That the plaintiffs severally relied upon such statements and believed them to be true, and were thereby misled to their injury. As to the first proposition, the evidence shows that none of the statements were actually made by all of the defendants, but that each defendant participated in making some of them. It is urged on behalf of the defendant Thompson that he participated *on* making but one of them. That is a mistake; the evidence is conclusive that he signed and participated in making at least four of them, the first being that made and published December 28, 1886, the last that made and published July 9,
215 1891. The mistake arises, perhaps, from the construction which the defendants seem to place on the petitions. The petitions set out two of the statements at length, but it is also alleged that at divers other times and dates, between the 28th day of December, 1886, and the 21st day of January, 1893, the defendants made and published other false and misleading reports purporting to show the condition of the bank which were relied upon by the plaintiff. The defendants appear to take the position, that the plaintiffs should be restricted to the two reports set out at length. We do not think so. The allegations of the petitions are sufficiently broad to admit proof of any and all statements made on and between the dates just mentioned. If definiteness and certainty required all such statements to be set out at length, the remedy was by motion.

As to the proposition that the statements were false, the evidence involves a maze of figures and computations covering a large portion of the bill of exceptions. The defendants contend, among other things, that the only discrepancies shown by the evidence are dis-

crepancies between the balance book of the bank and the statements, and that such discrepancies are due to the fact that the comptroller of the currency, in pursuance of his authority under the federal banking law, required a different classification of the items in such statements, than that under which they were classified on the books of the bank; that the relation between the totals was not thereby disturbed, consequently, such discrepancies are immaterial. The contention is not borne out by the record. The evidence not only tends to show discrepancies between the statements and the books of the bank, but also between such statements and the actual condition of the bank when the statements were respectively made, and that such discrepancies materially disturbed the relation be-
216 tween the totals of the assets and liabilities of the bank, and made its condition appear better than what it actually was. In short, there is ample evidence to sustain a finding that the bank was insolvent before and during the period covered by the transactions of the plaintiffs with it; that had the statements been made in accordance with the facts they would have shown, notwithstanding the classification required by the comptroller of the currency the true condition of the bank, or at least sufficient to put prospective customers upon inquiry; but instead, they exaggerated the assets, depreciated the liabilities, and were so framed as to conceal the actual condition of the bank and convey the impression that it was not only solvent but prosperous. In the face of these facts, no manipulation of figures or refinement of argument can make it appear that the discrepancies are immaterial, or, that there is a lack of proof that the statements were false. We do not wish to be understood to say that all of the defendants knew that such statements were false; we are satisfied that such is not the case. But, as was said in Gerner *v.* Mosher, 58 Nebr., 135, it was their duty to know whether the statements made by them were true, and the fact that they made and published them without knowledge of their falsity is no defense.

As to the proposition that the plaintiffs relied upon such statements and believed them to be true, and were thereby misled to their injury, we consider it sufficiently established by the evidence. The plaintiff Bailey testified, that he had had some money to invest and read the published statements of the different banks, including those of the Capital National, in order to keep himself informed of their condition. The following is a portion of his testimony on this point:

Q. How did you come to go to the Capital National Bank?

A. I went on purpose to see what they would pay on the
217 money. And I thought it was just as good as the First National.

Q. What information did you have as to the condition of the Capital National Bank?

A. As soon as I went in they handed me a card and the Directors and stockholders of the Bank were on that card. And I took the papers several years previous.

Q. What papers?

A. The Semi-Weekly Journal I believe and the Call.

Q. What did you see?

A. I saw the bank was in good circumstances, as I supposed, the way the amount of assets read in the published statements.

Q. Well, what did you read in those papers—published statements?

A. Yes—in the published statements in the paper.

Q. Of what bank?

A. The Capital National Bank of Lincoln, Nebr.

Q. State when it was, with reference to time——

A. I suppose ever since the bank started, for I read the papers every day and took particular notice. I had some money to loan out and I took a little notice where I thought was the best place to put it.

Q. And what reliance did you make, if any, upon these statements?

A. Well, that was all the reliance I had was what I could get information in the papers in regard to the standing of the bank.

Q. State what information, if any, you had other than what was disclosed in the statements that were published.

A. That was all the information I had.

Q. You may state where you got your information as to the condition of this bank.

A. I got it from the published statements.

Q. And from any other source?

218 A. No sir, I had no other source to get it from.

Q. State what effect those published statements had upon your transacting business at the Capital National Bank, if any?

A. Why that is all the effect I had to go by was the published statement, supposing it was to be true and correct.

Q. Did you believe it to be true?

A. I believed it to be true or I wouldn't have put my money there, I would have kept it where it was.

Q. Now you may state if you knew at any time, or had any means of knowing that the Capital National Bank * * * was not financially in the condition as represented by its statements.

A. I had no means of knowing.

Q. Well, did you have any knowledge.

A. I had no knowledge.

Q. State what belief, if any, you put in those statements prior to the time you deposited your money in the bank.

A. I believed the statements to be true, or I never would have put my money in the bank, that is sure.

Cross-examination:

Q. And there was no bank in Lincoln, or in the state that you knew of, that stood higher in the general estimation than it?

A. Not in my own mind according to their statement. I don't think there was any in Lincoln any way.

His evidence, fairly construed, sufficiently shows that he relied upon the false statements, believed them to be true, and, consequently, that the bank was safe; that acting in that belief, and influenced by it, he transferred his business to such bank. It is true, his evidence shows that he was influenced somewhat by the higher rate of interest this bank was paying. But it is well settled, that where false statement is relied upon, and is a material inducement, it is immaterial what other causes contributed to influence the
219 conduct of the injured party. Runge *v.* Brown, 23 Nebr., 817; Foley *v.* Holtry, 43 *Id.*, 133; Alcott *v.* Bolton, 50 *Id.*, 179; Sioux City National Bank *v.* Norfolk State Bank, 56 Fed., 139. The evidence adduced on behalf of the other plaintiffs on this point is stronger than that adduced by Bailey, and is sufficient, we think, in each case to sustain a finding that the plaintiffs relied upon the statements, believed them to be true and were misled thereby to their injury.

We have gone over the evidence in this case with some care, fully alive to the liability of the jurors to draw wrong inferences, in cases of this character, owing to the lack of time and facilities to consider and weigh the mass of evidence introduced, and are thoroughly satisfied that every fact, essential to a recovery in these cases, is sufficiently sustained by the evidence. We have also gone over the several errors assigned, and have examined them in the light of exhaustive briefs and luminous oral arguments of the learned gentlemen representing the respective parties, but have found no reversible error.

It is therefore recommended that the several judgments be affirmed.

By the COURT: For the reasons stated in the foregoing opinion, the said judgments and each of them are affirmed.

220 And afterward, on the 24th day of November, 1905, there was filed in the office of the Clerk of said Supreme Court a certain Motion for Rehearing in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

No. 13031.

CHARLES E. YATES and LOUISA HAMER, Administratrix of the Estate of E. P. Hamer, Deceased, Plaintiffs in Error,

v.

THE UTICA BANK, Defendant in Error.

Motion for Rehearing.

Now comes the plaintiffs in error and each for himself moves the Court to grant a rehearing in the above entitled cause for the following reasons:

1. The Court has erred in holding that the petitions on which the cases were tried in the District Court of Seward county stated a cause of action for deceit and fraud only, and not for the enforcement of any duties or liabilities of the directors, as officers of a national bank under the National Banking Act, and in construing said petitions as stating a different cause of action from that of the petitions filed in Lancaster county against the same defendants for the same cause of action, which are conceded and decided to be for the enforcement of duties and liabilities of the defendants under the National Banking Act.

2. The Court has erred in holding that it is bound by the construction placed upon the petitions by counsel for the plaintiffs in the actions commenced in Lancaster county, in pleading the
221 legal conclusion that these actions were for the enforcement of liability for violations of the duties and obligations of the Federal Banking Act, and that the omission of these legal conclusions in the petitions filed in Seward county upon the same causes of action justified the Court in holding that the rights, obligations and liabilities in the cases at bar are not determined by the Federal Banking Act, because the Court should have exercised its independent judgment in construing the petitions without regard to the construction of the pleader.

3. The Court has erred in holding that the petitions filed in the Seward County Actions stated a cause of action for fraud and deceit and different from those filed for the same cause of action in Lancaster County, because of the allegations of legal conclusions that the former were actions to enforce liability for violations of the Federal Banking Act which were omitted from the latter.

4. The Court has erred in determining the character of liability in these cases by looking to the petitions alone when the acts complained of and the character of liability should be determined by the issues joined between the parties and the evidence adduced pertaining to the law by which and under which the acts and things complained of were done.

5. The Court has erred in holding that the plaintiff could maintain his cause of action and recover damages in his own name as an individual depositor in the Capital National Bank.

6. The Court has erred in holding that a common law action of deceit could be maintained against the officers and directors of the Capital National Bank on account of the manner in which they managed and conducted the business of said bank, and in making and publishing reports to the Comptroller concerning the condition of said bank, in performance of their duties under the Na-
222 tional Banking Act which determined and provided the duties and liabilities of the defendants in their actions thereunder.

7. The Court has erred in holding that it was not necessary in establishing liability against the directors to show that the directors knew the falsity of reports to the Comptroller of the Currency, which they attested as required by the National Banking Act, because that Act provides for liability only in cases where they

knowingly violate or knowingly permit the violation of the provisions of that Act.

8. The Court has erred in holding that the United States Court of Appeals in the case of Jones *v.* Mosher, 107 Fed. Rep., 561, decided that the plaintiff's petition did not involve any Federal question, and that the petitions did state a cause of action when that Court did not decide the character of the case made by the petitions but only that it had no jurisdiction because the removal was made too late.

9. The Court has erred in holding and deciding that the defense reduced to its simplest form is that damages which result to a national bank from misfeasance and mismanagement of its officers are an asset of the bank recoverable from such officers only in an action by the bank for the benefit of all the stockholders, whereas, the defense actually made is that the only liability of the officers for acts done in the conduct of the business of the bank under the National Banking Act is that provided by the Banking Act and must be enforced against such officers for the benefit of all the creditors and stockholders for ratable distribution under the act.

12. The Court has erred in holding that the plaintiff is entitled to recover under the petitions filed for the reason that they state no sufficient cause of action for fraud, misrepresentation and deceit.

J. W. DEWEESE AND
FRANK E. BISHOP,
Att'ys for Pl'ffs in Error.

223–228 Endorsed: 13031. Yates *v.* Utica Bank. Motion for rehearing. Supreme Court of Nebraska. Filed Nov. 24, 1905. H. C. Lindsay, Clerk. Oct. 19/05. Opinion by Albert, C. Overruled 2-20-06.

* * * * * * *

229 And afterward, to-wit, on the 22nd day of February, 1906, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Judgment in the words and figures following, to-wit:

No. 13031.

CHARLES E. YATES ET AL., Plaintiffs in Error,
v.
UTICA BANK, Defendant in Error.

Error to the District Court of Seward County.

This cause coming on to be heard upon the motion of Defendant in Error for a rehearing on the motion to quash Bill of Exceptions, was submitted to the Court; upon full consideration whereof, it is by the Court ordered that said motion be, and the same hereby is overruled.

This cause further coming on to be heard upon the motion of Plaintiffs in Error for a rehearing herein, was submitted to the

Court; upon full consideration whereof, the court doth find no error apparent in the judgment heretofore entered herein by this
230 Court, and it is therefore considered, ordered, and adjudged that said motion be, and the same hereby is overruled and a rehearing herein refused and denied.

Upon request of Plaintiffs in Error, it is by the Court ordered that mandate in the above entitled cause be, and the same hereby is withheld until the further order of the Court.

231 And on the 22nd day of February, 1906, there was filed in the office of the Clerk of said Supreme Court a certain Petition for Writ of Error, which said original Petition for Writ of Error is hereto attached, and is in the words and figures following, to-wit:

232 In the Supreme Court of the State of Nebraska.

CHARLES E. YATES, LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased; CHARLES W. MOSHER and RICHARD C. OUTCALT, Plaintiffs in Error,

vs.

UTICA BANK, Defendant in Error.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of the State of Nebraska:

The above named plaintiffs in error each complain that in the judgment, decision, record and proceedings in a certain cause pending in the Supreme Court of the State of Nebraska in which the above named plaintiffs in error were the plaintiffs in error and Utica Bank was defendant in error which cause was decided and determined by the Supreme Court of the State of Nebraska and judgment of affirmance rendered therein on October 19, 1905, and in which a motion for a re-hearing in said court was overruled on February 21, 1906, at which time the judgment of said court became final, which Supreme Court of the State of Nebraska was the highest court in which decision or judgment could be had in said action, in which action and the judgment and the decision thereon there was necessarily involved and decided by said court that the provisions of the National Banking Act of the United States did not control, limit and determine the obligations and liability of the plaintiffs in error as officers and directors of the Capital National Bank of Lincoln Nebraska upon their conduct of the business of said bank, and the performance of their duties under said National Banking Act and upon the reports made by the officers and attested by the directors of said bank to the Comptroller of the Currency,
233 and that said officers and directors of said bank were liable for an action of deceit on said reports notwithstanding the provisions of the National Banking Act, and, by said judgment and

decision, refused to give full faith and credit to the judgment of the United States Circuit Court for the District of Nebraska, all in violation of the provisions of the National Banking Act and of Section 1, Article 4 of the Constitution of the United States, and of revised statutes of the United States Section 905, manifest error hath happened as appears from said judgment, decision and record and in the assignment of error herewith presented, to the great damage of the plaintiffs in error.

Wherefore, The said plaintiffs in error pray the allowance of a writ of error to the Supreme Court of the State of Nebraska for the removal of said record, judgment and proceedings in said action into the Supreme Court of the United States for its revision and correction thereof and for citation and supersedeas thereon, and your petitioners will ever pray.

CHARLES E. YATES,
LOUISA HAMER, *Adm'x,*
By J. W. DEWEESE &
FRANK E. BISHOP,
Their Attorneys.
RICHARD C. OUTCALT AND
CHARLES W. MOSHER,
By CHAS. O. WHEDON,
Their Attorney.

Writ of error allowed and ordered to issue.
February 21 1906.

SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court of Nebraska.

[Endorsed:] 13031. Yates *v.* Utica Bank. Petition for Writ of Error. Supreme Court of Nebraska. Filed Feb. 22 1906. H. C. Lindsay, Clerk.

234 And on the same day there was filed in the office of the Clerk of said Supreme Court certain Assignments of Error, in words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

CHARLES E. YATES, LOUISA HAMER, Administratrix of the Estate of Elis P. Hamer, Deceased; CHARLES W. MOSHER and RICHARD C. OUTCALT, Plaintiffs in Error,

vs.

UTICA BANK, Defendant in Error.

Now come the said several plaintiffs in error, Charles E. Yates, Charles W. Mosher and Richard C. Outcalt and Louisa Hamer, administratrix of the estate of Elis P. Hamer, deceased, and each separately and severally respectfully submit that in the record, proceedings, decisions and final judgment of the Supreme Court of

the State of Nebraska, in the above entitled cause there is manifest error, in this, to-wit:

Assignments of Error.

1. The Supreme Court of the State of Nebraska has erred in affirming the judgment against the several plaintiffs in error as rendered in the District Court within and for Seward county, Nebraska, in favor of the defendant in error.

2. The Court has erred in deciding that the petition on which said cause was tried and decided states facts sufficient to constitute a cause of action in favor of the defendant in error and against the several plaintiffs in error, or either of them.

3. The Court has erred in deciding that the petition filed by the defendant in error as its cause of action sets forth a common
235 law action for deceit and fraud based upon the reports made and attested by the plaintiffs in error to the Comptroller of the Currency as required by the National Banking Act.

4. The Court has erred in holding and deciding that the cause of action alleged by defendant in error, and on which judgment was rendered, is not governed and limited by the liability imposed upon the plaintiffs in error by the National Banking Act. (Title 62 U. S. Rev. Sts. of the U. S.)

5. The Court has erred in deciding that the common law action for deceit can be enforced against the plaintiffs in error based wholly upon the reports made by the President and Cashier of the Capital National Bank and attested by the directors of the said bank independent and exclusive of the liability imposed by the provisions of the National Banking Act under which they were acting in making, attesting and publishing such reports to the Comptroller of the Currency.

6. The Court has erred in deciding that Section 5239 of the Revised Statutes of the United States, being a part of the National Banking Act, does not control, nor limit, or determine the liability of the plaintiffs in error in making, attesting and publishing the reports to the Comptroller of the Currency, showing the condition of the bank.

7. The Court has erred in deciding that the fact that those plaintiffs in error who were directors were without knowledge of any falsity of the reports attested by them or some of them, mentioned in the petition, was immaterial, and that such directors or any of them were liable under the proofs showing they were without knowledge of the falsity of such reports; the said decision is in violation of the provisions of Section 5239 of the Revised Statutes of
236 the United States which makes liability of the directors dependent upon the fact that they knowingly violated or knowingly permitted the violation of the provisions of the National Banking Act, and participated in or assented to such violation.

8. The Court has erred in deciding that a common law action of deceit based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by the directors of such

bank can be maintained against such directors, without knowledge of any false statements in such reports, and without any participation in or assent to any violation of the National Banking Act as essential elements of the cause of action as required by Section 5239 of the Revised Statutes of the United States.

9. The Court has erred in deciding that, "The officers of a National Bank are personally liable for false reports made and published by them, in pursuance of Section 5211, Rev. St., U. S., to the party injured thereby and the right of the injured party to maintain the action does not rest on the federal statute, but the common law."

10. The Court has erred in deciding that the defendant in error could maintain his cause of action and recover damages against each of the plaintiffs in error in his own name and right as an individual depositor in the Capital National Bank, whereas the only recovery that could be had for false reports or violation of the National Banking Act could be by the bank itself, or its receiver or representative, such recovery to be for the benefit of all the creditors and to be ratably distributed among them as required by Section 5234 and 5236 of the National Banking Act.

237 11. The Court has erred in deciding the character of liability of the plaintiffs in error by looking to the petition alone, when the acts complained of, and the character of liability, should be determined by the issues joined between the parties, and the rights set up and claimed by the plaintiffs in error in their answers, and the evidence adduced pertaining to the National Banking law by which and under which the acts and things complained of were done, in violation of Section 709 of the Revised Statutes of the United States.

12. The Court has erred in deciding that it is bound by the construction placed upon the petition by counsel for the plaintiff in the same cause of action commenced in Lancaster county, by pleading the legal conclusion that the action was for the enforcement of liability for violation of the duties and obligations imposed by the National Banking Act, and that the omission of such legal conclusion in the petition filed in this case, upon the same cause of action, justified the Court in deciding that the rights, obligations and liabilities in the case at bar are not determined by the National Banking Act, for the reason that the Court should have construed the petition without regard to the construction of the pleader, or his legal conclusions.

13. The Court has erred in deciding that the cause of action alleged by the defendant in error constituted a common law action for deceit, whereas the ground of complaint as shown in the petition, and the recovery and judgment, are based upon the official misfeasance of the directors of the Capital National Bank, and their mismanagement of the same, in violation of their duties imposed upon them as officers and directors, by the National Banking Act.

238 14. The Court has erred in affirming the judgment, thereby approving instruction number 9th, given to the jury, which permitted the plaintiff to recover on a report of the condition of the

bank, attested by the directors, even though such directors did not know that the report was in fact false or untrue. Said instruction 9th, being as follows:

"9th. Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages sustained by one depositing money in such bank in reliance upon the false representation of the condition of the Bank contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue."

15. The Court has erred in approving the refusal of the District Court of Seward County, Nebraska, to give instruction number 6 requested by plaintiffs in error. Which instruction is as follows:

"6. The jury are instructed that if you find from the evidence introduced in reference to any one of the directors named in any one of the said cases that such director did not knowingly violate any of the requirements of the National Banking Act, under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant."

Wherefore, said plaintiffs in error each severally pray that the judgment of the said Supreme Court of said State of Nebraska
239 be reversed, and judgment be rendered herein in favor of said plaintiffs and for costs.

J. W. DEWEESE,
FRANK E. BISHOP,
For Defendants Yates and Hamer.
CHAS. O. WHEDON,
Attorney for Richard C. Outcalt and Charles W. Mosher.

Endorsed: 13031. Yates *v.* Utica Bank. Assignments of Error. Supreme Court of Nebraska. Filed Feb. 22 1906 H. C. Lindsay, Clerk.

240 And afterward, to-wit, on the 23rd day of February, 1906, there was filed in the office of the Clerk of said Supreme Court a certain Writ of Error and Allowance thereof, which said original Writ of Error and Allowance is hereto attached, and is in the words and figures following, to-wit:

241 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Justices of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Nebraska before you, or some of you, being the highest court

of law or equity of the said State in which a decision could be had in the said action between Charles E. Yates, Louisa Hamer, Administratrix of Elis P. Hamer deceased, Charles W. Mosher and Richard C. Outcalt, plaintiffs in error and Utica Bank, defendant in error wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity; or wherein was drawn in question the validity of the statute of or an authority exercised under said statute of Nebraska on the ground of their being repugnant to the Constitution, statutes or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under the United States, and the decision was against the right, title privilege or exemption specially set up or claimed under such clause of the said Constitution treaty or statute or commission, and manifest error hath happened to the great damage of the above named plaintiffs in error as by their complaint appears. We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have the same in said Supreme Court at
242 Washington within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the United States this 23rd day of February in the year of our Lord One Thousand Nine Hundred and six.

[Seal United States Circuit Court, District of Nebraska.]

GEO. H. THUMMEL,
Clerk Circuit Court of the United States
for the District of Nebraska,
By JOHN NICHOLSON, *Deputy.*

Allowed by
SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court
of the State of Nebraska.

[Endorsed:] 13031. Yates *v.* Utica Bank. Writ of Error. Supreme Court of Nebraska. Filed Feb. 23, 1906. H. C. Lindsay, Clerk.

243 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bond in words and figures following, to-wit:

In the Supreme Court, State of Nebraska.

CHARLES E. YATES ET AL.
vs.
UTICA BANK, Defendant.

Cost Bond on Writ of Error.

Know all men by these presents, that we Charles E. Yates as principal and W. S. Yates, as surety, are held and firmly bound unto Utica Bank in the sum of Five Hundred ($500) Dollars to be paid to Utica Bank, defendant in error, its successors, representatives and assigns to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 21 day of February, 1906.

Whereas, The above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment lately rendered in the Supreme Court of the State of Nebraska in the above entitled action,

Now, Therefore, the condition of this obligation is such that if said Charles E. Yates shall prosecute his writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

CHARLES E. YATES,
By W. S. YATES, *Att'y in Fact.*
W. S. YATES, *Surety.*

244 Sealed and delivered in the presence of

H. C. LINDSAY,
As Witness.

Approved as a cost bond by

SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court of the State of Nebraska.

Endorsed: 13031. Yates *v.* Utica Bank. Bond. Supreme Court of Nebraska. Filed Feb. 23, 1906. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bond in the words and figures following, to-wit:

In the Supreme Court, State of Nebraska.

LOUISA HAMER, Administratrix of Ellis P. Hamer, Deceased, ET AL.
vs
UTICA BANK, Defendant.

Cost Bond on Writ of Error.

Know all men by these presents, that we Louisa Hamer, administratrix of Elis P. Hamer, deceased, as principal, and A. G. Hamer, as surety, are held and firmly bound unto Utica Bank in the sum of Five Hundred ($500) Dollars to be paid to Utica Bank, defendant in error, its successors, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 23rd day of February, 1906.

Whereas, the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to
245 reverse a judgment lately rendered in the Supreme Court of the State of Nebraska, in the above entitled action,

Now, Therefore, the condition of this obligation is such that if said Louisa Hamer, administratrix of Elis P. Hamer, deceased, shall prosecute her writ of error to effect, and answer all costs if she fail to make her plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

LOUISA HAMER,
Administratrix.
A. G. HAMER,
As Surety.

Sealed and delivered in presence of
H. C. LINDSAY,
As Witness.

Approved as a cost bond by
SAMUEL H. SEDGWICK,
Chief Justice of Supreme Court.
of the State of Nebraska.

Endorsed: 13031. Yates *v.* Utica Bank. Bond. Supreme Court of Nebraska. Filed Feb. 23, 1906. H. C. Lindsay, Clerk.

And afterward, to-wit, on the 8th day of March, 1906, there was filed in the office of the Clerk of said Supreme Court a certain Citation, which said original Citation is hereto attached, and is in the words and figures following, to-wit:

246 Copy.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Utica Bank, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Nebraska, wherein Charles E. Yates, Louisa Hamer Admrx., Charles W. Mosher and Richard C. Outcalt are plaintiff- in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Samuel H. Sedgwick Chief Justice of the Supreme Court of the State of Nebraska, this 23d day of February in the year of our Lord One Thousand Nine Hundred and Six.

SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court
of the State of Nebraska.

Due and proper service of the within citation and the receipt of a copy thereof are hereby accepted, admitted and acknowledged this 8th day of March 1906.

UTICA BANK,
Defendant in Error,
By LIONEL C. BURR,
JOHN J. THOMAS,
RICHARD S. NORVAL,
Its Attorneys.

Supreme Court of Nebraska Filed Mar. 8 1906 H. C. Lindsay, Clerk.

[Endorsed:] Charles E. Yates *et al. v.* The Utica Bank. Citation. Supreme Court of Nebraska. Filed Mar. 8, 1906. H. C. Lindsay, Clerk.

247 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that the foregoing is a true and correct transcript of the record, opinion of the Court, and final judgment in a cause in said court, wherein Charles E. Yates, Louisa Hamer, Administratrix of the Estate of Ellis P. Hamer, deceased, David E. Thompson, Richard C. Outcalt and Charles W. Mosher were plaintiffs in error, and The Utica Bank was defendant in error, as fully as the same is of record and on file in my office.

I further certify that the Bill of Exceptions, a part of the record in said case, herewith transmitted, consists of three volumes designated respectively Volume I, which consists of pages 1 to 612, inclusive; Volume II, which consists of pages 613 to 1320, inclusive; and Volume III, which consists of pages 1321 to 1761 inclusive.

I further certify that the annexed petition for a writ of error, writ of error, and citation are the originals which were lodged in my office, and the whole is now returned in obedience to said writ of error.

I further certify that I have duly retained in my office true and correct copies of said petition for a writ of error, writ of error and citation, with the indorsements thereon.

In testimony whereof, I have hereunto set my hand and the Seal of said Court at Lincoln, this 9th day of March, A. D. 1906.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

248 UNITED STATES OF AMERICA, *Supreme Court of Nebraska, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my hand and affix the seal of said Supreme Court, in the City of Lincoln, this 9th day of March, A. D., 1906.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

MARCH 15, 1906.

Received of plaintiff- in error seventy-five dollars fifteen cents in full payment for within transcript.

H. C. LINDSAY,
Clerk Supreme Court.

249 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
UTICA BANK, Defendant in Error.

Notice.

Notice is hereby given to the above named defendant in error and *his* attorneys of record, that the assignments of error on which the plaintiffs in error will rely for a reversal of the judgment in said case are attached hereto, and in order to present said errors,

the plaintiffs in error designate the certain portions of the transcript of the record in said case, and of the bill of exceptions of the evidence as applicable to the errors relied upon, and said designated portions to be printed in order to present the errors complained of as shown in the schedules attached hereto.

J. W. DEWEESE AND
FRANK E. BISHOP,
Attorneys for Plaintiffs in Error.

Received copy of this notice with copy of assignments of error and designated portions of the record to be printed this 27 day of April, 1906.

L. C. BURR,
R. S. NORVAL, AND
J. J. THOMAS,
Attorneys for Defendant in Error.

250 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
UTICA BANK, Defendant in Error.

Assignments of Error Relied Upon for Reversal and as Basis for Printing Record.

5. The court has erred in deciding that the common law action for deceit can be enforced against the plaintiffs in error based wholly upon the reports made by the President and cashier of the Capital National Bank and attested by the directors of the said bank independent and exclusive of the liability imposed by the provisions of the National Banking Act, under which they were acting, in making, attesting and publishing such reports to the Comptroller of the Currency.

6. The court has erred in deciding that section 5239 of the Revised Statutes of the United States, being a part of the National Banking Act, does not control nor limit or determine the liability of the plaintiffs in error in making, attesting and publishing the reports to the Comptroller of the Currency showing the condition of the bank.

7. The court has erred in deciding that the fact that those plaintiffs in error who were directors, were without knowledge of any falsity to the reports attested by them, or some of them, mentioned in the petition, was immaterial and that such directors or any of them were liable under the proofs showing they were without knowledge of the falsity of such reports. The said decision is in violation of the provisions of Section 5239 of the Revised Statutes of the United States which makes liability of the directors dependent upon the fact that they knowingly violated, or knowingly permitted the violation of the provisions of the National Banking Act, and participated in or assented to such violation.

8. The court erred in deciding that a common law action of deceit based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by the directors of such bank, can be maintained against such directors without
251 knowledge of any false statements in such reports, and without any participation in or assent to any violation of the National Banking Act as essential elements of the cause of action, as required by section 5239 of the Revised Statutes of the United States.

9. The court has erred in deciding that, "the officers of a National Bank are personally liable for false reports made and published by them, in pursuance of section 5211, Revised Statutes of the United States, to the party injured thereby and the right of the injured party to maintain the action does not rest on the Federal Statutes, but the common law."

10. The court has erred in deciding that the defendant in error could maintain his cause of action and recover damages against each of the plaintiffs in error in his own name and right as an individual depositor in the Capital National Bank, whereas the only recovery that could be had for false reports or violation of the National Banking Act could be by the bank itself or its Receiver or representative, such recovery to be for the benefit of all of the creditors and to be ratably distributed among them as required by section- 5234 and 5236 of the Nationa- Banking Act.

11. The court has erred in deciding the character of liability of the plaintiffs in error by looking to the petition alone, when the acts complained of, and the character of liability, should be determined by the issues joined between the parties, and the rights set up and claimed by the plaintiffs in error in their answers, and the evidence adduced pertaining to the National Banking law by which and under which the acts and things complained of were done, in violation of section 709 of the Revised Statutes of the United States.

12. The court has erred in deciding that it is bound by the construction placed upon the petition by counsel for the plaintiff in the same cause of action commenced in Lancaster County, by pleading the legal conclusion that the action was for the enforcement of liability for violation of the duties and obligations imposed by the National Banking Act, and that the omission of such legal conclusions in the petition filed in these cases, upon the same
252 cause of action, justified the Court in deciding that the rights, obligations and liabilities in the case at bar are not determined by the National Banking Act, for the reason that the court should have construed the petition without regard to the construction of the pleader, or his legal conclusions.

13. The court has erred in deciding that the cause of action alleged by the defendant in error constituted a common law action for deceit, whereas the ground of complaint as shown in the petition and the recovery and judgment, are based upon the official misfeasance of the directors of the Capital National Bank, and their mismanagement of the same, in violation of their duties imposed upon them as officers and directors by the National Banking Act.

14. The court has erred in affirming the judgment, thereby approving instruction number 9th given to the jury, which permitted the plaintiff to recover on a report of the condition of the bank, attested by the directors, even though such directors did not know that the report was in fact false or untrue.

Said instruction 9th being as follows:

"9th. Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages sustained by one depositing money in such bank in reliance upon the false representations of the condition of the bank, contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue."

15. The court has erred in approving the refusal of the District Court of Seward County, Nebraska, to give instruction number 6 requested by plaintiffs in error. Which instruction is as follows:

"6th. The jury are instructed that if you find from the evidence introduced in reference to any one of the directors named in any one of the said cases, that such director did not knowingly violate any of the requirements of the National Banking Act, under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant."

16. The court has erred in deciding that the judgment of dismissal entered by the Circuit Court of the United States for
253 the District of Nebraska on February 9th, 1894, in an action then and there pending in which the defendant in error herein was plaintiff, and the plaintiffs in error herein were defendants, which judgment was affirmed by the Circuit Court of Appeals, reported in 65 Federal Reporter 488, which judgment was entered upon the same cause of action and for the same right to recover as is asserted in this case, is not a bar to this action, and an adjudication of the rights between the parties to the judgment herein; and in refusing to give full faith and credit to said judgment of the Circuit Court of the United States for the District of Nebraska, in violation of the provisions of the Constitution of the United States, Article 4, Section 1.

J. W. DEWEESE,
F. E. BISHOP,
Att'ys for Pl'ffs in Error.

254 In the Supreme Court of the United States.

CHARLES E. YATES, LOUISA HAMER, Administratrix; C. W. MOSHER, and R. C. OUTCALT, Plaintiff- in Error,
vs.
UTICA BANK, Defendant in Error.

Designation for Printing from the Transcript of the Record in the Above Entitled Case.

The plaintiffs in error in the above entitled case, request the Clerk of the Supreme Court of the United States to print the following designated portions of the transcript of the record applicable to the errors alleged in the above entitled case, number 638, to-wit:—

1. Title, venue and petitions in error of Charles E. Yates and Louisa Hamer, administratrix, of the transcript, pages 1 to the words "Be it remembered," in the last paragraph on page 10.

2. Transcript pages 14, amended petition and answers of Charles E. Yates and Louisa Hamer, administratrix, commencing with the words, "and afterwards on the 16th day of March, 1899," to and including the oath of Charles E. Yates on page 36.

(The answer and all pleadings of Walsh, and the Walsh estate should be omitted, as no judgment was rendered against them.)

3. Transcript pages 55, reply and stipulation, to 57 inclusive.

4. Transcript page 62, trail, commencing with the words, "And afterwards on the 28th day of May, 1902," to the end of said page.

5. Transcript pages 69, instructions given and verdict, commencing with the words, "And afterwards on the 19th day of June,
255 1902," to and including the first two lines on page 87.

6. Transcript page 87, instructions refused, commencing with the words, "And afterwards on the 19th day of June, 1902," to and including page 96, except the last paragraph thereon.

7. Transcript page 102, instructions refused, commencing with the words near top of the page, "And afterwards on the 19th day of June, 1902," including the first half of page 103, to the words "S. H. Sornborger, Judge."

8. Transcript page 112, motions for new trial, commencing with the words, "And afterwards on the 20th day of June, 1902," to and including the words, "Attorneys for said defendant?" on page 116.

9. Transcript page 120, motion for new trial commencing with the words, "And afterwards on the 20th day of June, 1902," to and including the words, "Attorneys for defendant Hamer," on page 124.

10. Transcript page 126, orders and judgment, to page 131 inclusive.

11. Transcript page 135, motion, stipulation and order on Bill of exceptions, commencing with the words, "And on the same day there was filed," to and including page 139.

12. Transcript page 200, proceedings, judgment, opinion and

motion on re-hearing in the Supreme Court to and including the first two lines on page 223.

13. Transcript page 229, order on re-hearing and proceedings on writ of error commencing with the words, "And afterwards, to-wit, on the 22nd day of February, 1906," to and including page 248.

J. W. DEWEESE,
F. E. BISHOP,
Att'ys for Pl'ffs in Error.

256 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
UTICA BANK, Defendant in Error.

Designating for Printing from the Bill of Exceptions of the Evidence in the Above Entitled Case.

The plaintiff in error in the above entitled case request the Clerk of the Supreme Court of the United States to print the designated portions of the bill of exceptions as follows, (The numbers refer to red figures at lower right hand corner of pages), to-wit:

There being no assignments of any errors on account of the offer and rejection of testimony, all objections and exceptions to testimony in the bill of exceptions of the evidence are to be omitted from the printed record.

1. Title, pages 1 and 2.
2. Testimony of A. D. Lynch, pages 8 to 13 inclusive.
3. Correspondence and oaths, page 14 to near the middle of page 21, (Similar oaths were taken by the directors from the beginning of the bank to the time of its failure in 1893).
4. Report of December 9th, 1892 and certificate of publication on reverse side, pages 39 and 40, front and reverse side, omitting objections.
5. Bank Charter, pages 52 and 53, omitting objections.
6. Letters to and from Comptroller, pages 56 except the first line, to 64 inclusive, omitting objections.
7. Publication of reports, page 68 commencing with the words "Notice of publication in the State Journal," to page 69 inclusive, omitting objections.
8. Publication of reports, commencing near the middle of page 76 with the words, "Mr. Norval, I now offer in evidence exhibit No. 980," and page 77 inclusive, omitting objections.
9. Testimony of H. J. Whitmore, page 340.
10. Cross-examination of H. J. Whitmore, page 708 *including* objection.

257 11. Cross-examination of H. J. Whitmore, page 709 commencing with the last question on said page with these words: "I will ask you to state whether these reports that you have referred to," to the end of the answer to that question on page 710, inclusive.

12. Testimony of E. Jacobs, page 864 to page 896 inclusive, omitting objections.

13. Testimony of E. Jacobs, page 901, beginning with the first question thereon, to page 903, ending with the answer: "I had no other source," omitting objections.

14. Testimony of E. Jacobs page 911 beginning with the question, to the words, "Witness excused" on page 916, omitting objections.

15. Testimony of Thomas Bailey, page 916 to the words "Witness excused," on page 934, omitting objections.

16. Testimony of Fritz Beckard, page 934, beginning with the words, "Mr. Fritz Beckard called as witness," to the words, "Witness excused" on page 949, omitting objections.

17. Testimony of H. T. Jones, page 974, to the words "Yes, sir," near the middle of page 975, omitting objections.

18. Testimony of H. T. Jones, page 977 to the last question on page 981, omitting objections.

19. Testimony of H. T. Jones, page 983 beginning with the first question thereon, to page 984, inclusive.

20. Testimony of C. E. Yates page 1111, commencing with the words "Mr. C. E. Yates called as a witness," to page 1121, ending with the words, "Witness excused," omitting objections.

21. Testimony of D. E. Thompson, page 1132 to the words "Witness excused," page 1188, omitting objections.

22. Former adjudication in the Bailey case, pages 1242 to 1274, inclusive, omitting objections.

258 23. Bank reports, pages 1297, commencing with words: "Mr. Thomas, the plaintiffs offer in evidence exhibit No. 1074," and exhibit number 1074 (7 sheets) attached, omitting objections.

24. Bank reports, pages 1304 and exhibit number 1075 (7 sheets) attached, omitting objections.

J. W. DEWEESE,
F. E. BISHOP,
Att'ys for Pl'ffs in Error.

259 [Endorsed:] File No. 20140. Supreme Court U. S., October Term, 1905. Term No. 638. Charles E. Yates *et al.*, Plaintiffs in Error, *vs.* Utica Bank. Assignment of Errors & designation by P. E. of parts of record to be printed with notice and acceptance of service. Filed May 1, 1906.

260 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
UTICA BANK, Defendant in Error.

Designation for Printing from the Bill of Exceptions of the Evidence in the Above Entitled Cause.

The defendant in error in the above entitled cause having been served with notice on April 27, 1906, by the plaintiffs in error, of

certain designations for printing from the bill of exceptions of the evidence in said cause, does now hereby request the Clerk of the Supreme Court of the United States to print the following designated portions of the bill of exceptions aforesaid in addition to that heretofore designated by the plaintiffs in error as aforesaid.

1. Commencing with the words "Oath of Directors" on page 36, to the words "R. C. Outcalt, Notary Public" at page 37 inclusive.

2. Certificate. Commencing with the words "Treasury Department. Office of" on page 54, take to the words "Deputy & Acting Comptroller of the Currency" on page 55 inclusive.

3. Report of August 1, 1887, including all of page 73.

4. Report of October 5, 1887, including all of page 75.

5. Commencing at top of page 79, to the words "Accts. solicited, Banks, Bankers and Merchants" on same page.

6. Report of December 12, 1888, including all of page 81.

7. Report of September 30, 1889, including all of page 84.

8. Report of December 11, 1889, including all of page 86.

9. Report of December 19, 1890, including all of page 88.

10. Report of July 9, 1891, including all of page 91.

11. Report of September 25, 1891, including all of page 93.

12. Report of December 2, 1891, including all of page 96.

13. Testimony of H. T. Jones, commencing at top of page 102, to the middle of page 108 inclusive, omitting objections and rulings thereon.

261 14. Testimony of G. W. Post, commencing on page 108 with the following words "G. W. Post called as a witness on behalf of the plaintiffs" etc., to the last question on page 112 inclusive, omitting objections and rulings thereon.

15. All testimony of G. W. Post on pages 110, 111 and 112 except the last question, omitting objections and rulings thereon.

16. Testimony of Edward Hurlbert, Jr., commencing on page 114, to and including the first question and answer thereto on page 118, ending with the words "A. I do not," omitting objections and rulings thereon.

17. Redirect examination of Edward Hurlbert, Jr., commencing with page 132 and including page 133 except questions and answers numbered 5, 6 and 7, and including page 134 to the words "that is all," omitting objections and rulings thereon.

18. Testimony of Edward Hurlbert, Jr., on page 145, commencing with the words "By Mr. Thomas" to and including the words "Witness excused."

19. Testimony of A. L. Clark on pages 146 to 148 inclusive to the words "Witness excused," omitting objections and rulings thereon.

20. Testimony of F. S. Johnson on pages 148 to 150 inclusive, omitting objections and rulings thereon.

21. Testimony of Leonidas M. Lawson, commencing at page 159, to and including first answer on page 178 as follows: "A. No such payment was made" omitting objections.

22. Testimony of William Ayres, Jr., commencing at page 182, to and including first question and answer on page 184.

23. Same witness, commencing with the last question on page

201, including all of page 202 and the first two lines on page 206, omitting objections.

24. Same witness, commencing with last question on page 213, to and including the first answer on page 214, omitting objections.

25. First two lines on page 240.

26. Certificate of judgment, Exhibit 991, on page 242.

262 27. Testimony of I. A. Baker on page 243. The 1, 2 and 3 questions and answers, omitting objections.

28. Certificate of judgment. Exhibit 992, on page 245.

29. Last question and answer on page 244, omitting objection.

30. All of page 247, omitting objections.

31. All of Exhibit 993, on page 249.

32. Testimony of I. A. Baker on pages 251 and 252, omitting objections.

33. All of Exhibit 994, on page 253.

34. Testimony on page 255, omitting objections.

35. All of Exhibit 995, on page 257 including last two lines on page 256.

36. Testimony of G. W. Shreck, pages 280 to 284 inclusive, omitting objections and rulings thereon.

37. Testimony of C. W. Hamilton from page 296 to 300 inclusive, omitting objections.

38. By-laws. Section 17 on page 318, and Section 26 on page 319.

39. On page 323 commencing with the words "Page 36—Special Meeting" to and including the first ten lines on page 324 and ending with the words "R. C. Outcalt, Sec'y."

40. Testimony of H. J. Whitmore, commencing with page 340, to and including second answer on page 343 ending with the words "to the Marsh National" omitting objections.

41. Same witness, on page 345 commence with the last question—take to and including first ten lines on page 348, ending with the figures "$15,050.88," omitting objections.

42. Same witness, on page 348, commence with the last question and take to and including the first four lines on page 352, ending with the words "Donnell, Lawson & Simpson."

43. Same witness, on page 354, commence with the first question and take to and including the second answer on page 356, ending with the words "Marsh National Bank" omitting objections.

44. Same witness, on page 357, commence with offer of Exhibit No. 1002 in following words "The entry offered, received and

263 read in evidence being as follows" and take to and including the last answer on page 371, ending with the words "of the Bank on that day," omitting objections.

45. Same witness, on page 372 commence with the second question (11 line from the top) and take to and including the first line on page 375, ending with the words "A. No sir," omitting objections.

46. Same witness, on page 375, commence with the second question on 14 line and take to and including the first line on page 376, ending with the words "A. Yes sir."

47. Same witness, all of page 379, omitting objections.

48. Same witness, on page 380, the second question and answer thereto, omitting objections.

49. Same witness, on page 382, commence with the last answer (5 line from bottom of page) and take to and including the last answer on page 384, ending with the words "A. No, there are none" omitting objections.

50. Same witness, on page 385, commence with the last two lines at bottom of page and take to and including page 392, omitting objections.

51. Same witness, on page 400, commence with the 12 line from the bottom and include that question and the answer following, ending with the words "A. I do."

52. Same witness, on page 401, commence with the 7 line from the bottom with the words "have you made an investigation" etc. and take to and including answer thereto on page 402, ending with the words "Yes sir" omitting objections.

53. Same witness, on page 404, commence with the third question and answer from bottom of page and include balance of page.

54. Same witness, on page 405, commence with third question (14 line from top of page) and take to and including the answer at top of page 406, ending with the words "it does" omitting objections.

55. Same witness, on page 432, commence with eighth line from the bottom (third question) and take to the bottom of page 438 omitting objections.

264 56. Same witness, on page 442, commence with the third question from the top (seventh line) take to and including answer on page 443 ending with the words "2nd of July."

57. Same witness, on page 444, commence with the second question near middle of page with the words "I will ask you" etc. and take to and including sixth answer on page 446, ending with words "I couldn't determine it from the books I have here to my own satisfaction."

58. Same witness, on page 453, commence with the fifth line (second question) from top of page and take to and including page 454, omitting objections.

59. Same witness, on page 457, commence with the two last lines at bottom of page and take to and including first two lines on page 459.

60. Same witness, on page 459, commence at third line from the bottom (last question) and take to bottom of page 460, omitting objections.

61. Same witness, on page 462, commence at top of page and take to the middle of page 464 ending with the words "Q. Does that include the surplus? A. No sir," omitting objections.

62. Same witness, on page 465, commence with thirteenth line from the bottom of the page (second question from bottom) and take to and including first thirteen lines on page 504, omitting objections.

63. Same witness, on page 520, commence at top of page omitting first line and take to and including all of page 527 omitting objections.

64. Same witness, on page 531, commence with second question (sixth line from top of page) and take to and including eleventh line from top of page 532 ending with the words "A. No sir" omitting objections.

65. Same witness, on page 535 commence with second question at top of page (nineth line from top) and take to and including the first line on page 554, omitting objections and omitting also the third question and answer on page 536 being lines from 16 to 19 inclusive.

66. Same witness, on page 561, commencing at top of page, to and including all of page 563, omitting objections.

265 67. Same witness, on page 564, commence at top of page and take to and including all of page 587.

68. Same witness, on page 588, take first four lines (first question and answer).

69. Same witness, on page 599, commence with first question (tenth line from top of page) and take to fifth line from bottom on page 591 ending with the words "shown in the published statement" omitting objections.

70. Same witness, on page 592, commencing with the last question on that page and take to the bottom of page 600 inclusive, omitting objections.

71. Same witness, on page 655, commence with the sixth question (twelfth line from top of page) and take the balance of that page.

72. Same witness, on page 679, commence at top of page and take to bottom of page 693 inclusive, omitting objections.

73. Same witness, all of pages 708, 709, 710, 711 and 712 *including objections and rulings of court thereon.*

74. Same witness, all of page 713 except the last question, ending with the words "is these copies of published statements."

75. Same witness, on page 755, question on that page and answer thereto on page 756 omitting objections.

76. Same witness, all of page 758 except the last question at bottom of page, omitting objections.

77. Our page 765 commence with the second question at the middle of page and take to and including the first answer (first four lines) at top of page 769, omitting objections.

78. Same witness, take last question on page 793 and answer thereto on page 794.

79. Same witness, take question on page 812 and answer thereto on page 813, omitting objections.

80. Schedules of certificates of taxes. Commence at top of page 813 and take to middle of page 829 inclusive, to the words "cross examination."

266 81. Testimony of E. Jacobs. Commence at top of page 864 and take to and including page 903, omitting objections.

82. Same witness, commence with question on page 911 and take the remainder of witness'*es* testimony to the words "witness excused" on page 916, omitting objections.

83. All of testimony of Thomas Bailey, pages 916 to 934 inclusive, omitting objections.

84. All of the testimony of Fritz Beckard, pages 934 to 949 inclusive omitting objections.

85. Testimony of Whitmore on pages 950 and 951 except last question on page 951, omitting objections.

86. Same witness, on page 960, commence with the second question (thirteenth line) and take to and including the first answer (first twelve lines) on page 963, omitting objections.

87. Same witness, on page 968, commence with the third question (tenth line) and take to page 970 inclusive ending with the fourth answer on the eleventh line.

88. Testimony of H. T. Jones. Commence at top of page 974 and take to and including first answer (fifth line) on page 1037, ending with the words "honestly kept" omitting objections.

89. Bill of sale and chattel mortgage. Commencing at top of page 1199 and take to and including page 1204.

90. Take first four lines on page 1312.

91. Deposition of John W. McDonald, Receiver. Take all of page 1323.

92. Same witness, on page 1325 take the first and second questions and answers.

93. Same witness, on page 1360, commence with the words "April 8, 1902, 2 O'Clock P. M." Ques. 197, and take to bottom of page 1370 inclusive omitting objections.

94. Same witness, on page 1374, commence with the words "redirect examination" and take to bottom of page 1377 inclusive, omitting objections.

267 95. Deposition of J. E. Hill. Commence at page 1382 and take to and including page 1392 ending with answer to question No. 299 with the words "A. I did not."

96. Same witness, take all of page 1408.

97. Deposition of D. J. Carnes. Commence at top of page 1417 and take to and including answer to interrogatory 28 on page 1423 ending with the words "into a good many thousands of dollars."

98. Same witness, on page 1427, commence with the words "redirect" (fourth line from top) take to and including signature of "Frank Langlas, Jr., Notary Public" on page 1429.

99. Deposition of P. M. Alden on page 1429. Commence with the words "P. M. Alden of lawful age" etc., take to and including answer to interrogatory 34, Page 1434 (nineth line from top).

100. Same witness, on page 1436, commence with the word "redirect" and take to and including the words "Frank Langlas, Jr., Notary Public" near bottom of page 1437.

101. Deposition of John W. McDonald, Receiver. Commence at top of page 1441 and take the first four questions and answers on same page, ending with the words "A. Yes" on fifteenth line.

102. Same witness, on page 1452, commence with the fourth question (sixteenth line from top) with the words "you may produce record book No. 1" etc., and take to and including the third answer on page 1458 ending with the words "A. They were rediscounted."

103. Same witness, on page 1463, commence with the words "May 15, 1902, 9 A. M." and take to and including the third answer on page 1466, ending with the words "A. Yes, I think so" omitting objections.

104. Same witness, take last question on page 1466 and answer thereto on page 1467, ending with words "A. Yes" omitting objections.

105. Same witness, on page 1471, commence with fourth question (thirteenth line from top) and take to and including the first answer on page 1472 ending with the words "A. Yes" omitting objections.

106. Same witness, on page 1473, commence with the third question (fourteenth line) take to and including the first question on page 1474 ending with the words "Q. You may refer to the ledger?" omitting objection.

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107. Same witness, on page 1484, commence with the words "Thomas: I now repeat my original question" etc., and take to and including second answer (eighth line) on top of page 1488, ending with the figures "A. $331,359.86," omitting objections.

108. Same witness, on page 1492, commence with the last question on seventh line from bottom of page and take to and including first question and answer on page 1504 ending with the figures "A. $300,000." omitting objections.

109. Same witness, on page 1504, commence with the last question at bottom of page (sixth line from bottom) and take to and including first question and answer at top of page 1506.

110. Same witness, on page 1508, commence with the fourth question (fourteenth line from top) and take to and including third answer on page 1519 ending with the words "Oh—I think they have very little value."

111. Same witness, on page 1521, commence with the last question (fourth line from bottom of page) and take to and including second answer on page 1524 ending with the words "Yes" on nineth line from top.

112. Same witness, commence at top of page 1540 and take to bottom of page 1541 inclusive, omitting objections.

113. Testimony of R. C. Outcalt. Commence at top of page 1548 and take to cross-examination on page 1606, omitting objections.

114. Testimony of Hale. Commence at top of page 1612 and take to and including answer to fifth question on page 1622 (seventh line from top of page) omitting objections.

115. Same witness, on page 1623, commence with the second question from the bottom and take to bottom of that page.

116. Same witness, on page 1624, take last question on that page and first answer on page 1625.

117. Same witness, take last question on page 1625 and all of page 1626 except the last two lines, ending with the words "A. They could not."

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118. Same witness, on page 1647, commencing with the third question (fourteenth line from top) with the words "Now Mr. Hale" etc. and end with the direct examination near bottom of page with the words "A. They are. Yes sir."

L. C. BURR,
R. S. NORVAL, &
J. J. THOMAS,
Attorneys for Defendant in Error.

Received a copy of the above designations for printing from the bill of exceptions of the evidence in the above entitled cause this 7" day of July, 1906, but we object to printing the designated portions of the record because not necessary to a review of the errors relied upon for reversal, and the costs of printing the same should be taxed to defendant in error.

J. W. DEWEESE &
F. E. BISHOP,
Attorneys for Plaintiffs in Error.

270 [Endorsed:] 231, 20,140. In the Supreme Court of the United States. Charles E. Yates, *et al.*, Plaintiffs in error, *vs.* Utica Bank, Defendant in error. Designations for printing from the Bill of Exceptions.

271 [Endorsed:] File No. 20,140. Supreme Court U. S. October Term, 1906. Term No. 231. Charles E. Yates *et al.*, Pl'ffs in Error, *vs.* Utica Bank. Designation by counsel for the defendant in error of Additional parts of bill of exceptions to be printed & proof of service of copy of same. Filed July 13th, 1906.

Endorsed on cover: File No. 20,140. Nebraska supreme court. Term No. 231. Charles E. Yates, Louisa Hamer, adm'x of Elis P. Hamer, deceased; Charles W. Mosher, *et al.*, plaintiffs in error, *vs.* Utica Bank. Filed March 20th, 1906 File No. 20,140.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 232.

CHARLES E. YATES, LOUISA HAMER, ADM'X OF ELIS P. HAMER, DECEASED; CHARLES W. MOSHER, ET AL., PLAINTIFFS IN ERROR,

vs.

THOMAS BAILEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MARCH 20, 1906.

(20,141.)

(20,141.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 232.

CHARLES E. YATES, LOUISA HAMER, ADM'X OF ELIS P. HAMER, DECEASED; CHARLES W. MOSHER, ET AL., PLAINTIFFS IN ERROR,

vs.

THOMAS BAILEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 No. 13032.

CHARLES E. YATES, LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased, and David E. Thompson
v.
THOMAS BAILEY.

RICHARD C. OUTCALT
v.
THOMAS BAILEY.

CHAS. W. MOSHER
v.
THOMAS BAILEY.

Pleas before the Supreme Court of the State of Nebraska, at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 2nd day of January, A. D. 1906.

Present: Hon. Samuel H. Sedgwick, Chief Justice; Hon. John B. Barnes, Judge; Hon. Charles B. Letton, Judge.
Attest:
H. C. LINDSAY, *Clerk.*

Be it remembered, that on the 28th day of November, A. D., 1902, there was filed in the office of the Clerk of said Supreme Court a certain Petition in Error of Charles E. Yates in the words
2 and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

CHARLES E. YATES, Plaintiff in Error,
v.
THOMAS BAILEY Defendant in Error.

Petition in Error.

The plaintiff complains of the defendant, for that on the 21st day of July, 1902, the defendant herein recovered a judgment against the plaintiff herein, in the district court of Seward county, Nebraska, for the sum of $11,054.69 and costs amounting to the sum of $—. That subsequently, and on the 22nd day of October, 1902, at the same term of said court, an order was made by said court requiring the said defendant in error to remit a portion of said judgment, as the same was excessive to the extent of $1372.32; and that said defendant in error filed a remittitur in obedience to the order of said court, and judgment was then formally entered in favor of the defendant in error and against this plaintiff in error, in the sum of $9,682.37 in said action pending in said court, wherein the

defendant herein was plaintiff and the plaintiff herein was defendant.

A transcript of said judgment, pleadings and proceedings in said cause, together with the bill of exceptions containing all of the evidence introduced, is filed herewith.

The plaintiff alleges that there is error in said proceedings and judgment, in this:

1st. The court erred in overruling the objections of this de-
3 fendant below to the introduction of any testimony, at the time the same was offered on trial of said cause, as appears by the bill of exceptions in said cause, page 8; said objection being based upon the character of the case as made in the plaintiff's petition, it being strictly and specifically alleged that the defendant below in the several acts of misconduct, negligence, misfeasance and fraud of which the plaintiff complained, acted in his official capacity as a director of the Capital National Bank; and that acting as such director it became and was his duty under the law, as well as the by-laws of said National Bank, as is alleged, to do various and sundry things which he neglected to do, and which he purposely omitted to do; and that in his official capacity, and acting as such director, he did various things, as is specifically alleged, in violation of his duties and obligations as a director of said bank, under the law and the by-laws of said bank, thereby causing heavy losses to the said bank, which caused its insolvency, and which it is alleged resulted in a damage to the plaintiff below; whereas, if said allegations of misfeasance, nonfeasance and fraud of said defendant below in his capacity as a director of said National Bank were true, any damage caused by the facts alleged would be a direct damage to said bank, and any recovery therefor would be an asset of said bank to be ratably distributed among the creditors and stockholders of said bank; and such damages were recoverable alone by said bank, or the receiver of said bank, and not by the plain- below in
4 his individual capacity against the defendant below.

2nd. The court erred in rendering judgment against the defendant below, for the reason that under the issues joined and the evidence introduced, the plaintiff below was not entitled under the law to recover a judgment for himself individually against the defendant below in his individual capacity or otherwise; and for the reason that whatever damage there was, if any, caused by the negligence, misconduct and fraud of the defendant below in his capacity as a director in the Capital National Bank, was recoverable alone by said Bank or the Receiver of said Bank, and not by the plaintiff below.

3rd. The court erred in refusing to give the first paragraph of the instructions requested by this plaintiff in error, defendant below, for the court to direct the jury to return a verdict in favor of the defendant below, being numbered 1, and found in the transcript on page 69.

4th. The court erred in giving the eleventh paragraph of the instructions given by the court, numbered 11th, found on page 52 of the transcript.

5th. The court erred in giving to the jury the sixteenth paragraph of its charge to the jury, numbered 16th, where he undertakes to define the actionable negligence of a director of the bank in not discovering the embezzlement of funds by the president of the bank or of the cashier, thus fixing a liability not recognized by the law fixing and defining the duties of directors of national banks, and in direct violation of the principle and requirements specified in Sections 5239 and other sections of the National Banking Act.

6th. The court erred in giving the seventeenth paragraph of its instructions to the jury, numbered 17th, for the same reasons as set forth in the assignment of errors concerning the giving of the sixteenth paragraph above mentioned.

7th. The court erred in refusing to give the *sixth* paragraph of the instructions requested by the defendant below, numbered 6th, wherein the duties and liabilities of directors of national banks are defined in accordance with the provisions of the National Banking Act.

8th. The court erred in each one of its instructions to the jury in the construction and application of the duties and liabilities of directors of national banks under the national banking act, as shown by paragraphs of the charge of the court to the jury numbered 9th, 10th, 11th, 16th and 17th.

9th. The court erred in overruling the motion for a new trial.

10th. The court erred in entering judgment against the defendant Charles E. Yates, for the reason that the plaintiff's cause of action, if it ever had any against him, did not accrue to him within five years prior to the commencement of said action; and said action was barred by the statute of limitations as against said defendant.

11th. The court erred in refusing to give force and effect to the former adjudication of the claim of the said Thomas Bailey for the same cause of action against the same defendants as presented in the case herein; and, in allowing judgment to be entered in favor of the said Thomas Bailey and against the said defendants, refused to give faith and credit to the final judgment that was entered in the Circuit Court of the United States for the District of Nebraska, between the same parties on the same cause of action, being a full and final adjudication of the same questions and cause of action involved in the present case; the error of the court therein being a direct violation of the Constitution and laws of the United States.

12th. The court erred in refusing to give the seventeenth paragraph of the instructions requested by the defendant below, numbered 17.

The plaintiff therefore prays that said judgment may be reversed and said cause of action dismissed, and that said plaintiff in error go hence without costs.

J. W. DEWEESE,
Att'y for Pl'ff in Error.

Endorsed: 13032. Charles E. Yates, *et al. v.* Thomas Bailey. Petition in Error of Charles E. Yates. Supreme Court of Nebraska. Filed Nov. 28 1902. Lee Herdman Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Petition in Error of Louisa Hamer, Administratrix, in the words and figures following, to-wit:

6 In the Supreme Court of the State of Nebraska.

LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Dec'd, Plaintiff in Error,

v.

THOMAS BAILEY, Defendant in Error.

The plaintiff complains of the defendant, for that on the 21st day of July, 1902, the defendant herein recovered a judgment against the plaintiff herein, in the district court of Seward county, Nebraska, for the sum of $11,054.69 and costs amounting to the sum of $—. That subsequently, and on the 22nd day of October, 1902, at the same term of said court, an order was made by said court requiring the said defendant in error to remit a portion of said judgment, as the same was excessive to the extent of $1372.32; and that said defendant in error filed a remittitur in obedience to the order of said court, and judgment was then formally entered in favor of the defendant in error and against this plaintiff in error, in the sum of $9,682.37 in said action pending in said court, wherein the defendant herein was plaintiff and the plaintiff herein was defendant.

A transcript of said judgment, pleadings and proceedings in said cause, together with the bill of exceptions containing all of the evidence introduced, is filed herewith.

The plaintiff alleges that there is error in said proceedings and judgment, in this:

7 1st. The court erred in overruling the objections of this defendant below to the introduction of any testimony, at the time the same was offered on the trial of said cause, as appears by the bill of exceptions in said cause, page 8; said objection being based upon the character of the case as made in the plaintiff's petition, it being strictly and specifically alleged that the defendant below in the several acts of misconduct, negligence, misfeasance and fraud of which the plaintiff complained, acted in his official capacity as a director of the Capital National Bank; and that acting as such director it became and was his duty under the law, as well as the by-laws of said National Bank, as is alleged, to do various and sundry things which he neglected to do, and which he purposely omitted to do; and that in his official capacity, and acting as such director, he did various things, as is specifically alleged, in violation of his duties and obligations as a director of said bank, under the law and the by-laws of said bank, thereby causing heavy losses to the said bank, which caused its insolvency, and which it is alleged resulted in a damage to the plaintiff below; whereas, if said allegations of misfeasance, nonfeasance and fraud of said defendant below in his capacity as a director of said National Bank were true, any damage caused by the facts alleged would be a direct dam-

age to said bank, and any recovery therefor would be an asset of said bank to be ratably distributed among the creditors and stockholders of said bank; and such damages were recoverable alone by said bank, or the receiver of said bank, and not by the plaintiff below in his individual capacity against the defendant below.

8 2nd. The court erred in rendering judgment against the defendant below, for the reason that under the issues joined and the evidence introduced, the plaintiff below was not entitled under the law to recover a judgment for himself individually against the defendant below in his individual capacity or otherwise; and for the reason that whatever damage there was, if any, caused by the negligence, misconduct and fraud of the defendant below in his capacity as a director in the Capital National Bank, was recoverable alone by said Bank or the Receiver of said Bank, and not by the plaintiff below.

3rd. The court erred in refusing to give the first paragraph of the instructions requested by this plaintiff in error, defendant below, for the court to direct the jury to return a verdict in favor of the defendant below, being numbered 1, and found in the transcript on page 69.

4th. The court erred in giving the eleventh paragraph of the instructions given by the court, numbered 11th, found on page 52 of the transcript.

5th. The court erred in giving to the jury the sixteenth paragraph of its charge to the jury, numbered 16th, where he undertakes to define the actionable negligence of a director of the bank in not discovering the embezzlement of funds by the president of the bank or of the cashier, thus fixing a liability not recognized by the law fixing and defining the duties of directors of national banks, and in direct violation of the principal and requirements specified in Sections 5239 and other sections of the National Banking Act.

9 6th. The court erred in giving the seventeenth paragraph of its instructions to the jury, numbered 17th, for the same reasons as set forth in the assignment of errors concerning the giving of the sixteenth paragraph above mentioned.

7th. The court erred in refusing to give the sixth paragraph of the instructions requested by the defendant below, numbered 6th, wherein the duties and liabilities of directors of national banks are defined in accordance with the provisions of the National Banking Act.

8th. The court erred in each one of its instructions to the jury in the construction and application of the duties and liabilities of directors of national banks under the national banking act, as shown by paragraphs of the charge of the court to the jury numbered 9th, 10th, 11th, 16th and 17th.

9th. The court erred in overruling the motion for a new trial.

10th. The court erred in entering judgment against the defendant Louisa Hamer, Administratrix of the Estate of Ellis P. Hamer, deceased, for the reason that the plaintiff's cause of action, if he ever had any against her, did not accrue to him within five years

prior to the commencement of said action; and said action was barred by the statute of limitations as against said defendant.

11th. The court erred in refusing to give force and effect to the former adjudication of the claim of the said Thomas Bailey for the same cause of action against the same defendants as presented in the case herein; and, in allowing judgment to be entered in favor of the said Thomas Bailey and against the said defendants, refused to give faith and credit to the final judgment that was entered in the Circuit Court of the United States for the District of Nebraska, between the same parties and on the same cause of action, being a full and final adjudication of the same questions and cause of action involved in the present case; the error of the court therein being a direct violation of the Constitution and laws of the United States.

12th. The court erred in refusing to give the seventeenth paragraph of the instructions requested by the defendant below, numbered 17.

The plaintiff therefore prays that said judgment may be reversed and said cause of action dismissed, and that said plaintiff in error go hence without costs.

J. W. DEWEESE,
Att'y for Pl'ff in Error.

Indorsed: 13032. Charles E. Yates, *et al. v.* Thomas Bailey. Petition in Error of Louisa Hamer, Adm'x. Supreme Court of Nebraska. Filed Nov. 28, 1902. Lee Herdman, Clerk.

11–14 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Transcript in the words and figures following, to-wit:

District Court of Seward County, Nebraska.

Pleas before the District Court of the Fifth Judicial District of Nebraska in and for the County of Seward, at a term thereof begun and holden in the City of Seward, in said County and State, on the 19th day of May One Thousand Nine Hundred and Two.

Present: Honorable S. H. Sornborger, Judge. J. M. Calder, Clerk.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STEWART, RICHARD C. OUTCALT, and ROLLO O. PHILLIPS, Defendants.

* * * * * * *

15 And afterwards, on the 16th day of March 1899, there was filed of record in the office of said Clerk a certain Amended Petition in word- and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY, Plaintiff,

vs.

CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STUART, RICHARD C. OUTCALT, and ROLLO O. PHILLIPS, Defendants.

Amended Petition.

The plaintiff for this amended petition complaines of the defendants and alleges that on prior and subsequent to the 9th day of December, 1892, and at the several times hereinafter mentioned the defendants acted as the directors and officers of the Capital National Bank, a corporation duly organized and doing a general banking business in the city of Lincoln, Nebraska, and as such directors had the full control and management of said bank.

That acting as such directors and officers of said bank, it became and was the duty of the defendants and each of them under the law as well as the by-laws of said bank to actively and actually manage and superintend the business of the same, to examine the books of said bank including loans and discounts, to examine the loans made,
to whom made, the security therefor, and when due; to see
16 that the general condition of said Bank corresponded with its
books, to see that the resources and liabilities of said Bank corresponded with the books of said Bank, to see that all notes and bills receivable held by said bank and entered upon its books and in its statements as valuable assets were in fact good valuable and collectable, and to see that all such as were worthless or of little or no value were charged off from the assets of said Bank, and not included in its statements, to see that the valuable effects, assets, and other matters including the cash on hand and in other banks on depositories agreed with the books of said Bank.

That the defendant- and each of them failed to perform*ed* the aforesaid duties and each and all of them imposed upon them by law, and by the by-laws of said Bank, and by reason of such failure large loans were made by the Bank to insolvent persons upon inadequate or no security, and to its officers, and to those who were relatives and favorites of the defendants as officers or acting officers of the Bank.

That the Books of said Bank were out of balance, that they allowed and permitted forced balances to be made and carried on the Bank books, the deposits account was falsified, being greatly understated, the real estate, bills receivable, and deposit account each being largely inflated; that they permitted to be carried on the books of the Bank and permitted and caused to be published statements and advertisements, wherein they included as valuable assets of the bank large and numerous notes and bills receivable from persons as due and owing to the Bank from persons who were worthless and irresponsible, and also included in their statements of the resources and liabilities of said Bank, and also upon its books as good and valuable, numerous

notes, bills receivable and other resources in large amounts that were either wholly worthless or of little or no value, and also permitted large amount of notes, bills receivable and other items, due the bank to remain past or overdue without taking steps to collect or
17 secure the same, whereby the same were lost to the bank and became and were entirely worthless; and they permitted and continued from time to time to carry such worthless and valueless notes, bills receivable, and other assets upon the books of said Bank as a part of its valuable and available assets when they knew, or should by proper diligence and examination have known the same to be worthless, and of no value, and from time to time they published, permitted and allowed and caused to be published to the public and informed and represented to plaintiff in the numerous statements made by them to plaintiff that such notes, bills receivable, and other worthless assets were good and collectible and part of the valuable resources and effects of said Bank when in truth and in fact they knew and were in duty bound to know said statements and each and all of them to be false and utterly untrue; that the resources of said bank were largely inflated and the liabilities thereof largely shrunken, and the published statements and advertisements and the books of the Bank did not show its true condition in this that the Bank by its books and the published statements and advertisements showed that it was in good sound financial condition when it was in truth and in fact in an insolvent condition, and was and had been in an insolvent condition since and prior to December 9th, 1892, and that such insolvency resulted from the careless and negligent manner in which the defendants acting as such directors and officers managed and superintended the Bank and its business, and — all of which facts and circumstances the defendants, and each of them, had full knowledge, and it was the duty of each of them under the law to so know and inform themselves regarding the true condition of said Bank.

That after said Bank became insolvent as aforesaid the defendants made, caused, allowed and permitted to be made state-
18 ments to the plaintiff and the public showing said Bank solvent, its capital stock unimpaired, and a surplus on hand, and so continued to publish, cause allow and permit to be published said statements showing it in the condition aforesaid until it closed its doors and ceased doing business on January 21st, 1893. That after the insolvency aforesaid it continued to pay out large semi-annual dividends on its stock of from 4 to 8 per cent., until within a short time of its closing its doors as aforesaid and ceasing to do business.

That after said Bank became insolvent as aforesaid the said defendant permitted said Bank to continue in business and receive deposits and loans from plaintiff and others, the defendants having knowledge of such insolvency, or ought — have known, and could have known by the exercise of ordinary care in the discharge of their duties as directors or acting directors and of the insolvency of said Bank this plaintiff was at all time- entirely ignorant.

That while said Bank was insolvent as aforesaid the defendants negligently and fraudulently caused and permitted advertisements and statements to be made and published in the Lincoln, Nebraska, daily and weekly newspapers, setting forth the solvency of said Bank for the purpose of inducing plaintiff and others, and the public generally, to loan, deposit and keep money in said Bank, and the plaintiff relying upon said published statements as it had the right to do, deposited and loaned his money to said Bank as hereinafter stated.

That if it had not been for such false statements aforesaid and for these hereinafter set forth this plaintiff would not have deposited and loaned any money to said Bank as he did from time to time
19 and hereafter set forth, nor would he have allowed the same to remain therein, but on account of the false statement referred to aforesaid he allowed the same to remain on deposit, when but for said false and untrue statements he would have promptly withdrawn his loans and deposits before the failure of said Bank, and that he was prevented from so doing by reason of said false and untrue statements aforesaid showing said Bank to be in a good, sound financial condition and solvent, when in truth and in fact it was not in a good sound financial condition, but was wholly and utterly insolvent.

That on the 9th day of December, 1892, said Bank being insolvent as aforesaid, the defendants for the purpose of inducing the plaintiff and others to do and continue business with and to loan and deposit money with said bank made, caused allowed and permitted a false statement of the condition of said Bank, and its resources and liabilities, which said statement made is hereto attached and marked "Exhibit A," which said statement was made caused allowed and permitted to be made by the said defendants as such directors and officers of said Bank for the purpose of deceiving the plaintiff and others and induce- the plaintiff and others to do and continue doing business with said Bank as aforesaid, and said defendants on said date caused allowed and permitted said false statements to be published in the newspapers of general circulation in Lincoln, Nebraska, and which said papers were of general circulation in the State of Nebraska.

Plaintiff avers that on the 28th day of December, 1896, the said defendants and each of them acting as such directors and officers of said Bank, for the purpose of deceiving the plaintiff and others and for the purpose of inducing the plaintiff and others to believe said Bank sound, solid and solvent, and to induce the plaintiff and others to do business with said Bank aforesaid made caused, allowed and permitted to be made a false statement of its resources
20 and liabilities, a copy of which statement is hereto attached, and marked "Exhibit B," and caused allowed and permitted said statement to be published in various newspapers in general circulation in the City of Lincoln, Nebraska which said newspapers were of general circulation in the State of Nebraska for the purpose and with the intent to induce this plaintiff and others to loan money and deposit money with said Bank, when in truth and in fact said

Bank was not in a sound, solid, safe and solvent condition, but was wholly insolvent.

This plaintiff avers that on and between January 3rd, 1887 and January 21st, 1893, the defendants with the fraudulent intent and purpose as aforesaid, during all of said time made, allowed, caused and permitted to be made at divers intervals false statement- of the condition of said Bank as to its resources and liabilities with the intent and purpose of deceiving the plaintiff and others as aforesaid and caused, acquiesced in, allowed and permitted said false statements, and each of them severally to be published in newspapers of general circulation in the city of Lincoln, Nebraska, which said papers aforesaid were of general circulation in the state of Nebraska.

And plaintiff avers that said statements and each of them showed, and the defendants in each of said statements, and by said statements represented that said bank was in a thoroughly sound, safe and solvent condition and was doing a prosperous business and was in all respects a safe and secure institution with which to do business, and a safe bank in which to make deposits and loans of money, and said statements were prepared and published and were caused, permitted and allowed to be prepared and published by said defendant- for the purpose of making it appear to this plaintiff and others that said Bank was sound, safe and solvent, and thereby inducing this plaintiff and others to believe and rely on said statements as aforesaid; that said statements and each of them as made and
21 published stating the resources and liabilities of said Bank as aforesaid, were read and looked over by the plaintiff, and plaintiff avers that he believed them to be true and correct statements of the condition and resources of said Bank, and that during said period of time,—the exact time of which plaintiff cannot at this time state,— the said defendants had conversations with plaintiff as aforesaid at divers times and during the time when said published statements were made as aforesaid between July 23rd, 1884 and January 21st, 1893, in which said conversations said defendants represented said Bank, of which they were directors and acting directors and officers was thoroughly safe and sound, a-d believing said published statements and advertisements as aforesaid and said verbal representations so made by said defendants to be true and believing them to be true and relying upon the same, that said Bank was sound and solid and solvent and doing a flourishing and prosperous business, and said statements and advertisements showed, and represented as in said verbal statements, this plaintiff on the 11th day of October, 1892, loaned to and deposited with said Bank, of which defendants were the directors and acting directors and officers a sum of money, and continued to loan and deposit with said Bank from said date from time to time large sums of money up to and including the 21st day of January, 1893, and plaintiff avers that on the 1st day of January, 1893, plaintiff had a balance to his credit in said Bank amounting to Eleven Thousand Five Hundred, ($11,500) Dollars, money he had loaned to and deposited with said Bank.

That plaintiff loaned and deposited in said Bank the following sums and amounts upon the following dates, to-wit:

22	October	11th,	1892	$500.00
	"	11th,	1892	1000.00
	"	11th,	"	8000.00
	December	28th,	"	500.00
	"	28th,	"	500.00
	"	28th,	"	1000.00

Plaintiff avers that said statement and advertisements so published as aforesaid, and said statements as verbal-y announced to the plaintiff, were, as the defendants and each of them well knew, and were in duty bound to know grossly exaggerated and wholly false and untrue, and that the liabilities of said Bank were in each of said statements and advertisements grossly misstated, and the resources inflated and exaggerated as hereinbefore stated. That whereas said statements and advertisements, and each of them, as well as said verbal statements made and caused, allowed and permitted to be made to the plaintiff as aforesaid, showed that said Bank was sound, solid and solvent, and doing a flourishing business, when in truth and in fact said Bank was not doing a flourishing and prosperous business, and was in fact at the time said statements and advertisements were published and verbally made, in an unsafe precarious condition, and at the time of the last published statement as aforesaid, and for a long time prior thereto, was in fact insolvent and could not pay the money owing plaintiff and others.

That the true condition of said bank was well known to said defendants at the several times they made said statements and advertisements as published and as verbally made to the plaintiff, but notwithstanding they knew its unsafe and insolvent condition and had full access to its books and accounts and were in a position to know, and it was their duty to know the true condition of said bank, and they and each of them should and could have known its true condition by the exercise of ordinary care in the discharge of their duties as directors, and acting as directors and
23 they each of them willfully negligently and recklessly for the purpose and with the intent aforesaid, made caused allowed, and permitted to be made and published said false statements and advertisements and verbal false statements as hereinbefore set forth for the purpose of inducing the plaintiff and others to do business with and make loans to and deposit money in said bank.

Plaintiff further avers that its knowledge of the condition of said bank was wholly derived from said published statements and advertisements, and by said verbal statements so made to him by said defendants and that had said statements and advertisements so published and as verbally made as aforesaid set out given the true condition of said Bank, it would have appeared, and it would have been shown that said Bank was not sound, solid and solvent, and that it was not a safe institution in which to do business, and the plaintiff would not have made said loans and deposits with said Bank.

Plaintiff avers that after making said loans and deposits with said bank, which were each and all made by plaintiff relying upon said statements and advertisements as aforesaid, to-wit: on the 21st

day of January, 1893, said bank suspended business and went into the hands of a Receiver, and that said bank then was, and had been for many years prior thereto and at the time of publishing said statements and advertisements and making said verbal statements by said defendants to the plaintiff as aforesaid insolvent, and unable to meet its obligations, and could not pay its debts, and did not have the assets and resources that said defendant said it had, in said published statements advertisements, and verbal statements made as aforesaid, and that by reason thereof said Bank could not and did not pay this plaintiff any part of said sum of money loaned
24 and deposited with said Bank, except the sum of Seventeen Hundred and Twenty-Five and no/100 ($1725) Dollars, and that the remainder of said money so loaned and deposited with said Bank had been wholly lost to this plaintiff by reason of the facts hereinbefore set forth.

Plaintiff states that by reason of facts as above set forth and the false and fraudulent statements, advertisements, and representations of the defendants the plaintiff has been damaged in the sum of Fifteen Thousand ($15000.00) Dollars.

Wherefore plaintiff prays judgment against the defendants, and each of them for the sum of Fifteen Thousand ($15,000) Dollars, its damages, with interest thereon from January 21st, 1893 at 7 per cent. and costs of suit.

THOMAS BAILEY, *Plaintiff,*
By BURR & BURR, &
GEO. W. LOWLEY,
BIGGS & THOMAS, *Its Attorneys.*

THE STATE OF NEBRASKA, *Seward County, ss:*

Thomas Bailey being first duly sworn on his oath says that he is the plaintiff in the above and foregoing action, that he has heard read the above amended petition and knows the contents thereof, and that the facts therein contained are true as he believes, and further he saith not.

THOMAS BAILEY.

Subscribed in my presence and sworn to before me this 1st day of May, A. D., 1897.

[SEAL.] GEO. W. LOWLEY,
Notary Public.

Commission Expires May 25, 1899.

25 "EXHIBIT A."

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business December 9, 1892.

Resources.

Loans and discounts		768,601.44
Overdrafts secured and unsecured		6,217.74
United States Bonds to secure circulation		50,000.00
Stocks, securities, etc		325.00
Due from approved reserve agents		107,090.01
Due from other National Banks		17,800.33
Due from State Banks and Bankers		5,394.72
Banking house, furniture and fixtures		5,770.00
Other real estate and mortgages owned		38,716.92
Current expenses and taxes paid		14,286.28
Checks and other cash items		3,698.56
Exchange of clearing house		8,841.16
Bills of other Banks		2,355.00
Fractional paper currency, nickels and cents		298.71
Specie		26,789.50
Legal tender notes		17,431.00
Redemption fund with United States Treasurer (5 per cent. of circulation)		1,350.00
Total		$1,074,867.37

Liabilities.

Capital stock paid in		$300,000.00
Surplus fund		6,000.00
Undivided profits		21,180.75
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$356,139.33	
Demand certificates of deposit	158,545.14	
Due to other National Banks	81,574.14	
Due to State Banks and bankers	47,372.89	
		643,632.24
Note and bills rediscounted		59,054.38
Total		$1,074,867.37

STATE OF NEBRASKA, *County of Lancaster, ss:*

I, R. C. Outcalt, Cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowl-
26 edge and belief.

R. C. OUTCALT.

Subscribed and sworn to before me this 15th day of December, 1892.

HAL C. YOUNG,
Notary Public.

Correct.
Attest:
C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,
Directors.

"EXHIBIT B."

Report of the Condition of the Capital National Bank in Lincoln, in the State of Nebraska, at the Close of Business December 28, 1886.

Resources.

Loans and discounts	$737,462.12
Overdrafts	3,974.33
U. S. Bonds to secure circulation	50,000.00
Other stock, bonds and mortgages	22,739.34
Due from approved reserve agents	74,068.63
Due from other National Banks	56,215.29
Due from State Banks and Bankers	10,495.36
Real Estate, furniture and fixtures	7,177.33
Current expenses and taxes paid	8,885.65
Premiums paid	7,188.43
Checks and other Cash items	13,742.02
Bills of other Banks	3,712.00
Fractional paper currency, nickels and cents	216.42
Specie	27,308.00
Legal tender notes	10,400.00
Redemption with U. S. Treasurer (5% circulation)	1,900.00
Total	$1,035,448.92

27

Liabilities.

Capital stock paid in		300,000.00
Surplus funds		12,000.00
Undivided profits		28,439.38
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$414,962.35	
Demand certificates of deposit	40,859.66	
Due to other National Banks	107,648.27	
Due to State Banks and Bankers	37,448.66	
		597,918.94
Notes and bills rediscounted		52,090.00
Total		$1,035,448.92

STATE OF NEBRASKA, *Lancaster County, ss:*

I, C. W. Mosher, President of the above Bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

C. W. MOSHER, *President.*

Subscribed in my presence and sworn to before me this 11th day of October, 1886.

E. R. SMITH, *N. P.*

Correct.
Attest:
C. W. MOSHER,
C. E. YATES,
D. E. THOMPSON,
Directors.

And afterwards, on the 15th day of April, 1899, there was filed in the office of the said Clerk a certain Demurrer in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Now comes the defendants Charles E. Yates and Ellis P. Hamer, and all other defendants and demur to the amended petition as amended by interlineation, for the following reasons;

28–34 1st. The said petition shows that this Court has no jurisdiction to try and determine the issues in said action, the petition showing that the cause is founded upon the acts of negligence of the defendants as directors of the Capital National Bank and the allegation of their duty under the National Banking Act.

2nd. The said petition does not state facts sufficient to constitute a cause of action against these defendants and in favor of the plaintiff.

F. M. HALL,
J. W. DEWEESE, &
F. E. BISHOP,
Att'ys for Def'ts.

* * * * * * *

35 And afterwards, on the 15th day of July 1901, there was filed in the office of said Clerk a certain answer in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Separate Answer of Charles E. Yates and Ellis P. Hamer to Plaintiff's Petition as Amended by Interlineation March 16, 1899.

Now comes the defendants Charles E. Yates and Ellis P. Hamer, and in obedience to the order of the court, each make answer for himself separately to the plaintiff's petition as amended by interlineation on the 16th day of March, 1899.

These defendants say *the* whether the plaintiff made the deposits in the Capital National Bank of Lincoln at the times and
36 in the amounts stated in said amended petition, these defendants have not knowledge or information, and they therefore deny that such deposits were made.

First Defense: These defendants each for himself alleges that the Capital National Bank of Lincoln referred to in said amended petition, was organized and had its existence under and by virtue of the national banking act passed and approved by the Congress of the United States. That Homan J. Walsh was the vice-president of said bank and Richard C. Outcalt was the cashier of said bank, and that each of the other defendants was a director of said bank. That said bank was closed by the national bank examiner on or about the 23rd day of January 1893, and that soon after said date a receiver was duly appointed by the Comptroller of the Currency to take charge of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment.

That no forfeiture of the franchises of the said banking association has ever been declared by the Comptroller of the Currency or adjudged by any court, for reason of the violation of any of the provisions of the national banking act by the directors and officers of said bank, or for any other reason.

That the duties and obligations of the directors of said bank were such and only such as were required by the national banking act under which said bank was organized and existing.

These defendants deny that they signed or attested the reports set out and referred to in the said amended petition, and deny that they made, signed or attested any report purporting to show the condition of said bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

37 These defendants further say that the said cause of action set out in the plaintiff's amended petition, if he have any, is founded up- alleged facts, which, if true, constituted a violation by these defendants as directors, of their duties as such directors as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management

of national banks. And these defendants allege that if any liability attaches to them or either of them as directors of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of these defendants or either of them, there is necessarily involved the construction of said national banking act relating to the duties of directors of national banks. That a federal question is involved in determining the liability of these defendants by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of these defendants.

These defendants further answering, each for himself, denies each and every allegation in the plaintiff's petition, except as hereinbefore stated or admitted.

Second Defense: These defendants further say, each for himself, that the plaintiff on or about the 27th day of October 1893, brought an action against these same defendants in the district court of Lancaster County, Nebraska, on the same cause of action as now set out in the plaintiff's amended petition, and that a removal of said cause of action from the Lancanster County District Court to the United States Circuit Court for the District of Nebraska was duly made, and after the filing of said cause of action in the said United States Court on removal, a motion was duly made by the plaintiff, Thomas Bailey,

to remand said cause to the District Court from which it had
38 been removed, and which action was overruled.

That subsequently, and on or about February 9th, 1894, these defendants, together with other defendants in said cause then pending in the said United States Circuit Court, filed demurrers to the petition of the said plaintiff, which on consideration of the court were sustained, and a judgment was duly entered in favor of the said defendants for costs, amounting to the sum of $125.73; and the plaintiff's cause of action was dismissed by the said court.

That subsequently, and on or about the 13th day of February 1894, the plaintiff in said action, being the same plaintiff as in this action, sued out a writ of error and took an appeal from the ruling and judgment entered by the said Circuit Court of the United States, to the United States Circuit Court of Appeals. That such proceedings were had on the application of the plaintiff in said Circuit Court of Appeals for a reversal of the said judgment as are necessary to obtain a hearing in said Circuit Court of Appeals, and that a hearing was duly had and an opinion and judgment rendered affirming the judgment of the Circuit Court of the United States in said case; said judgment of affirmance being duly entered in the said Court of Appeals on or about the 10th day of November 1894, and adjudging also that the said plaintiff pay the costs incurred in the said appeal, amounting to the sum of $72.25.

These defendants further say that said judgments entered in the said Circuit Court of the United States for the District of Nebraska and in the United States Circuit Court of appeals in said cause, have never been set aside or appealed from, and they stand of record in

full force and effect as a final adjudication of the plaintiff's cause of action against these defendants.

39 These defendants further say that the said judgments in the said courts for costs as above stated have never been paid by the plaintiff; that said judgments for costs remain in full force and effect against the said plaintiff and in favor of these defendants.

The defendants therefore allege that the cause of action in this cause or pretended cause of action as set forth in the plaintiff's amended petition herein, has been fully adjudicated and by reason of such adjudication and the non-payment of the said judgments so entered, by the plaintiff, the defendants allege that this last cause of action is simply vexatious and an abuse of the process of this Court, and that the plaintiff is barred and estopped by reason of said judgment and the non-payment of the same, from maintaining this cause of action.

Third Defense: As a further defense to the plaintiff's pretended cause of action as set forth in its petition as now amended, these defendants say, each for himself, that said cause of action now pending was commenced in the District Court of Seward County, Nebraska, on or about the 25th day of February 1895 by said Thomas Bailey, plaintiff, making Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt and Rolla O. Phillips, defendants. That on or about the 9th day of July 1895 the said plaintiff took judgment in this action against the defendant Ambrose P. S. Stuart, for the full amount of his claim as made against all of the defendants; the plaintiff's cause of action being a joint and several claim against each and all of the defendants That said judgment so rendered in the District Court of Seward County in favor of the plaintiff Bailey and against the said defendant Stuart, has not been reversed or set aside, but in due course of time executions were issued on said judgment for the collection of the same; and levies were duly made upon the property belonging to the said defendant Stuart, and said property was sold in satis-

40 faction of the said judgment rendered in favor of the plaintiff Thomas Bailey. And these defendants allege the fact to be that the plaintiff's claim against these defendants so ripened into judgment has been fully paid and satisfied and the judgment should be discharged on record if it has not already been so discharged, and that said judgment so taken by the said Bailey against the said defendant Stuart and the payment thereof is a complete bar against any further judgment or claim in favor of the said plaintiff against these defendants.

Fourth Defense: These defendants for a further and separate defense to the plaintiff's cause of action, say that as hereinbefore alleged in the first defense in this answer, these defendants in all of their actions concerning and in connection with the said bank acted in their capacity as directors of said national bank, and if they neglected any duty as such directors or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against these defendants sounding in damages, said cause of action existed, if any,

in favor of the said bank or the receiver of said bank after his appointment, and not in favor of this plaintiff.

These defendants allege the facts to be that if the plaintiff deposited his money in said bank as alleged, and the bank then failed and became insolvent, the plaintiff could not individually recover the said money from the said bank, and that the said money as well as any damage caused by the alleged neglect of duty on the part of these defendants, did not give rise to any cause of action in favor of this plaintiff; but allege the fact to be that if such damages resulted from the conduct or neglect of duty on the part of these defendants, a judgment therefore under the law could only be reco-ered by the said bank in its corporate capacity or by the receiver of said
41–52 bank; and such damage when recovered would under the law be distributed ratably by the said bank or by the receiver of said bank, among the creditors and stockholders of said bank.

These defendants, each for himself, denies all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

These defendants therefore allege that the plaintiff has no cause of action against these defendants or either of them.

Wherefore, the defendants pray judgment for costs.

J. W. DEWEESE,
F. M. HALL,
FRANK E. BISHOP,
Att'ys for Said Def'ts.

STATE OF NEBRASKA, *Lancaster County, ss:*

Charles E. Yates being first duly sworn, upon his oath says that he is one of the defendants in the above entitled cause; that he has read the foregoing answer, knows the contents thereof, and that the facts therein set forth are true, as he verily believes.

C. E. YATES.

Subscribed in my presence and sworn to before me by the said Charles E. Yates, this 15th day of July, A. D. 1901.

[SEAL.] WM. B. KIRBY,
Notary Public.

* * * * * * *

53 And afterwards, on the 23rd day of August, 1901, there was filed herein a certain Reply in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Reply to the Separate Answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher, and Richard C. Outcalt.

And now comes the plaintiff and for his reply to each of the separate answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher and Richard C. Outcalt, *and* denies each and every allegation of new matter contained in their several answers.

THOMAS BAILEY,
By R. S. NORVAL,
GEO. W. LOWLEY,
J. J. THOMAS, AND
L. C. BURR.

STATE OF NEBRASKA, *Seward County, ss:*

Thomas Bailey, plaintiff, being duly sworn according to
54–57 law, deposes and says that he had read the foregoing reply and knows the contents thereof and that the same are true as he verily believes.

THOMAS BAILEY.

Subscribed in my presence and sworn to before me this 23d day of August, A. D. 1901.

[SEAL.] E. J. NEWTON,
Notary Public.

* * * * * * *

58 And afterwards, on the 28th day of May, 1902, there was filed with the Clerk of said Court a certain Stipulation in words and figures following, towit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

THE JONES NATIONAL BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

UTICA BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Stipulation.

The parties to this stipulation in each of the above entitled causes which are now pending in the district court of Seward county, Nebraska, hereby stipulate and agree that all of said causes shall
59 be tried in the District Court at one and the same time, and that the evidence proper and applicable in any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, subject of course to the objections of either of the parties to this stipulation and governed by the ruling of the Court, shall be offered and produced and the cases respectively disposed of by Court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence, insofar as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation, shall be considered by the jury in such case in the disposition thereof; such evidence being properly applied to any one or to all of the parties to this stipulation as the facts and rulings of the court may warrant.

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in such case may be received, and that then the whole evidence as thus introduced shall be properly applied to each respective case and to each respective party thereto under the rulings and directions of the Court, subject to the objections of either party.

It is therefore agreed that if either party or any party to any of said causes represented in the stipulation shall desire to prosecute error from the judgment of the District Court in any or in all of said cases, a transcript of the testimony given on the trial of all
60–68 of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one bill of exceptions and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases, and that the bill of exceptions settled in one case shall be the bill of exceptions in each and all of said cases.

In Witness Whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,
J. J. THOMAS,
Attorneys for Plaintiffs.
H. F. ROSE AND
J. W. DEWEESE,
Attorneys for D. E. Thompson.
J. W. DEWEESE,
Att'y for Def'ts Yates, Walsh Estate, & Hamer Estate.
CHAS. O. WHEDON,
Attorney for Chas. W. Mosher and R. C. Outcalt.

* * * * * * *

69 And afterwards on the 19th day of June, A. D. 1902 there was filed of record in the office of said Clerk a certain Instructions to the Jury, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST
v.
CHARLES W. MOSHER ET AL.

JONES NATIONAL BANK
v.
CHARLES W. MOSHER ET AL.

UTICA BANK
v.
CHARLES W. MOSHER ET AL.

THOMAS BAILEY
v.
CHARLES W. MOSHER ET AL.

Instructions to Jury.

70 GENTLEMEN OF THE JURY:

1st. The jury are instructed that these actions were brought against C. W. Mosher, President of the Capital National Bank, and

R. C. Outcalt Cashier of said Bank, and against D. E. Thompson, Charles E. Yates, Ellis P. Hamer and R. O. Phillips as directors of said bank, and Homan J. Walsh as Vice President of said bank, the defendants Walsh, Hamer and Phillips have since died; and the estates of Hamer and Walsh are represented in these actions by their administrators. No revivor of the action against R. O. Phillips has been had, and consequently you can not find any verdict against Phillips.

Given.

2d. All of the foregoing entitled cases are submitted to you for determination at one trial and on the same evidence, so far as such evidence is applicable to the respective cases and to the respective defendants. Each of the defendants make a separate defense, and each of the defendant- in each of the cases can only be bound or affected in any way by such evidence as may be applicable to him and to his conduct under the charges made in the respective petitions of each case.

Given.

3d. The jury are instructed that in considering the various charges and allegations made against each defendant in the several cases submitted to you, you are not to arrive at any conclusion or determine any fact by mere conjecture or speculation; and you are further instructed that the burden of proof is upon the plaintiff to establish the facts alleged against any defendant in these several actions; and you must determine such facts from the evidence relating to such charges and facts and not determine the same by inference, not founded upon evidence, conjecture or guess-work.

Given.

Defendants severally except. S. H. Sornborger, Judge.

71 4th. The jury are instructed that if you find that one or more of the defendants named in each of said cases have been guilty of negligence, misconduct and fraud, charged in said petitions in the several cases, that fact would not affect any one of the other defendants, nor make such other defendants, or any one of them guilty of such negligence, misconduct or fraud. In other words, although you may believe from the evidence that one of the defendants named had done and committed or neglected the things charged in the petitions in the different cases under the proof rendered, yet you are instructed that the negligence and misconduct and fraud of each defendant can be attributed to no one of the other defendants without proof that such other defendant, or defendants participated therein.

Given.

Defendants severally except. S. H. Sornborger, Judge.

Second 4th.

4th. Each of the plaintiffs above mentioned allege substantially, in the same or similar form, the same general allegations in their petitions, the principal difference in the petitions being the amount which each severally alleges it had on deposit, or had loaned to the Capital National Bank, of whom the defendants are alleged to be officers and directors, and the amount claimed in their sev-

eral petitions, and the sum- which should be credited to them as having been either paid by the Receiver of the bank at divers times, to-wit, 17%, and the amounts which are realized on the sale of the property of the former defendant in this action, Stuart, to be ratably applied, is undisputed and the several amounts, together with interest thereon to this date is as follows: The Bank of Staplehurst $13,510.96, Jones National Bank, $16,888.43, Utica Bank $8,292.92, Thomas Bailey $11,-54.69.

72 And these several sums are the amounts to be named in your verdict as the sum which the said several plaintiffs may recover against the defendants whom you may find liable under the evidence and instructions, in case only your verdict should be for the plaintiffs, or such of them as you may find in favor of.

Given.

Defendants severally except. S. H. Sornborger, Judge.

5th. Each of the several plaintiffs allege that the defendants mentioned in said several petitions were the officers and directors of the Capital National Bank, doing a banking business in the City of Lincoln, and that by reason of the statements made by such officers and published in the Nebraska State Journal, and the Evening Call newspapers alleged to be published in Lincoln, of the condition of said bank, and showing said bank to be in a solvent and prosperous condition, the said several plaintiffs were induced to, and did deposite the several sums of money above indicated to you, in said bank, relying upon said representations so published as to the solvent condition of said bank.

And the plaintiffs allege that statements of its condition showing the solvency and soundness of said bank were published at divers and sundry times from the year 1886 down to and including December 9" 1892.

And the plaintiffs severally allege in their several petitions that said statements as to the conditions of said bank were at all times during said period wholly false and untrue, and that in fact and in truth the said bank was not at any of said time or during said period solvent and in sound condition, but was in fact and in truth in an insolvent condition.

And the plaintiffs severally allege that the resources of said bank were stated in said several statements published by the said de-

73 fendants grossly exaggerated and inflated, and stated to be greater than in truth they were, and that the liabilities of said bank at all times was by said published reports made to appear less than said liabilities of said bank really were, and that much of the nominal assets of said bank, such as its Bills Receivable and Stocks and Bonds were, while represented by said reports to be assets of value, in fact worthless and uncollectible, and of little or no value. And that its liabilities were much greater than was represented in said statements so published or permitted to be published by the said defendants. That by reason of the worthlessness of said assets and by reason of the excess of the liabilities, and by reason of the mismanagement and inattention, and gross negligence of the defendants the said bank about the 21st day of January 1893 suspended busi-

ness closed its doors and was taken possession of by a Receiver. And that by reason of the premises the plaintiff lost the sums of money severally, at that time on deposit in said bank as hereinbefore set forth.

Given.

Defendants severally except. S. H. Sornborger, Judge.

6th. The defendants answering severally, each for himself, admit their relationship as officers and directors, severally, of the bank at and during the time alleged in the petition, and admit that said bank was closed by a national bank examiner, about the 23rd day of January 1893, and allege that it has been in the control of a Receiver since that time. Each of the defendant Directors, and also the defendant Walsh, denies that he signed or attested the reports of the condition of said bank referred to in said petitions and denies that he made, signed or attested any report purporting to show the condition of said bank for the purpose and in the manner alleged in the plaintiffs' said petitions. And they and each
74 of them deny every allegation of the plaintiffs' several petitions except those allegations admitted as above stated.

Given.

Defendants severally except. S. H. Sornborger, Judge.

7th. These allegations of the petitions and denials set forth in the answers constitute the issues to be tried in these cases. And the burden of proof is therefore upon the plaintiffs to show by a preponderance of the testimony the truth of the allegations contained in their several petitions. In other words the burden is upon the plaintiffs severally to show that the defendants severally published or caused to be published or participated in the publication of statements of the condition of the Capital National Bank from time to time during its existence as by the plaintiffs severally alleged; to show that the plaintiffs each for himself, or itself, relied upon the truth of said statements of the condition of said bank, and to show that such statements were untrue, that is to say that said bank was insolvent, or that its assets were not truly stated, or that liabilities were understated to such degree and extent as to impair its solvency.

Given.

Defendants severally except. S. H. Sornborger, Judge.

8th. The mere fact that a bank was insolvent at any time, or at all times, standing by itself, would not entitle the plaintiffs or any of them to recover. The mere fact that it was insolvent at any time or at all times, and that statements were published by the defendants or any of them, which were substantially false would not entitle the plaintiffs or any of them to recover. The plaintiffs, and each of them in addition to proving both the above propositions must in addition thereto proved by a preponderance of testimony that such
75 published statements of the condition of the bank came to their notice, and was relied upon by them, and that they acted in reliance upon them in making the loans to or deposits with said bank before — could recover from the defendants or either of them.

The mere fact, that other inducing causes operated together with the foregoing considerations such as the obtaining of a higher rate of interest would not render the defendants or any of them less liable, provided always that such plaintiffs had notice of and relied upon the truthfulness of the published reports.

Given.

Defendants severally except. S. H. Sornborger, Judge.

9th. Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages sustained by one depositing money in such bank in reliance upon the false representation of the condition of the bank contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue.

Given.

Defendants Severally except. S. H. Sornborger, Judge.

10th. The director of a bank who publishes, or participates in the publication of a report of its condition, by such act asserts that the statements contained in such report are substantially true, and he cannot rely upon his ignorance of the true condition of the bank as a defense to an action, when he in such published reports represents the bank to be solvent, if in truth it is not solvent and its assets are fictitious or worthless, or its liabilities so much greater than
76 its assets as to render the bank insolvent.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

11th. It is not alleged by the plaintiffs and the proof does not indicate that all of the officers and directors of the Capital National Bank signed any one of the alleged public statements of the condition of the bank; it being required of the bank and its officers and directors that such statements should be verified by the oath of the President or the Cashier, and attested by at least three of the Board of Directors, subsequently it was not necessary in any one report for each, or all of the directors and officers of the bank either to sign or verify such published statements. And in the particular case of the defendant H. J. Walsh, who was as before stated to you Vice President of said Bank, it is not in evidence that at any time he signed his name to any of the published statements aforesaid.

It is alleged in the several petitions however, that each and all of said defendants at divers and sundry times, either as officers and directors, made out, signed and published, or caused to be made out signed and published the statements in question.

You are instructed in that behalf, that it is not necessary in order to create a liability of any one of the defendants, for the plaintiffs to show that any such director or officer actually with his own hand signed or caused to be published the statements alleged to have been published. It is sufficient if the plaintiffs have shown that such officer or director participated in making and publishing the said statements.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

12th. In determining whether or not the defendant directors or officers did in fact participate in any or all of the statements
77 alleged, or shown to have put forth and published, besides considering any testimony, if any, which goes directly to show that such director or officer personally signed the same, you are at liberty to take into consideration the length of time such officers or director- had been in the service of the bank in such capacity at the time of any particular publication, the opportunities which he had for knowing the course of events in the bank, and of knowing that the bank officers and directors were issuing statements of the condition of the bank and causing the same to be published in the public newspapers, and consider from all these facts and circumstances taken together with all the other testimony touching upon the same, whether or not he in fact participated in and assented to the issuance and publication of such statements.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

13th. And although you should find from the testimony that any particular director or officer of said bank did not himself directly cause to be issued and published the statements concerning the condition of said bank, yet if you should find that at the time such statements were being published in the public press, such director or officer was a resident of the city of Lincoln, was in a condition of health to be about giving his ordinary attention to business, and was not absent from home, that is absent from the city of Lincoln, such facts should be taken into consideration by you, together with the other evidence and circumstances in the case in determining whether or not that officer or director knew of and participated in the issuance and publication of any or all of the statements of the condition of said bank.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

78 14th. By assets of a bank are meant all that class of valuable property pertaining to and belonging to the bank, including its money, and its bonds, its real estate, its accounts of deposit with other banks and bankers, its Bills Receivable and its overdrafts. But a worthless o erdraft, Bills Receivable or account, which as we commonly understand the term, is not collectible and against persons shown to be insolvent is not an asset of the bank.

The liabilities of a bank, generally speaking, consists of the items of account which it owes to other people including its deposits whether upon certificate or open account. Whether a bank is solvent or insolvent at any particular time depends upon whether its available assets as before defined, are sufficient in amount to meet its liabilities. A bank is not insolvent merely because upon any particular day, or at any particular time it should not have sufficient money or cash items of account to immediately pay all of its liabilities, but is only insolvent when all its available and good assets are insufficient to pay all its liabilities.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

15th. There has been testimony offered tending to show that the names of accounts in the books were not always the same as the names of the accounts in the published statements of the affairs and concerns of the bank.

In that behalf you are instructed that a mere change in the name of an account, so long as the account and its nature is not actually falsified and made to appear different from what it really is, is not such a misrepresentation as can be complained of. In order to be a material misrepresentation it must be such a misrepresentation of the assets, as before defined, and of the liabilities of the
79 bank as to misrepresent the real and actual condition of the bank.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

16th. You are instructed that proof that a President or Cashier misappropriated or embezzled funds of the bank, or falsified the books of account is not of itself sufficient to establish actionable negligence against the directors who have not participated therein, but if such embezzlements or misappropriations or falsifications are of such great extent, and are of such long continuance as would have, upon reasonable examination, challenged the attention of an ordinarily prudent business man then you would be justified in finding that the directors were charged with notice of such misappropriation or embezzlements and falsifications.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

17th. It is the duty of the bank officers and directors to give to the affairs of a bank such reasonable care and supervision and oversight as ordinary men of business prudence exercise in the supervision and care of their own business affairs and concerns which they delegate to the immediate administration of others.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

18th. You are instructed that the credibility of witnesses, and the weight to be given to the testimony of each is a matter exclusively for the jury. The jury have the right to determine from the appearance of the witness on the stand, their manner of testifying,
80 their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances appearing on the trial find which witnesses are the more worthy of credit, and to give credit accordingly.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

19th. In considering the weight to be given to the testimony of any witness it is proper for you, and you should take into consideration among the other matters heretofore referred to in the foregoing instructions, the interest of the witness if any in the event of the suit, their temper or feeling of bias, if any has been shown by them in their testimony, and their means of information as to the subject concerning which they testify, and to give such credit to the

testimony of each witness as under all the circumstances such witnesses to be entitled to.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

20th. By the preponderance of the testimony the court means the greater weight of evidence; that is to say, the preponderance of evidence upon any given issue, where the evidence is conflicting upon such issue, is that which, upon consideration of all the facts and circumstances proved at the trial produced the greater impression of truth upon the mind.

Given.

Defendants Severally Except. S. H. Sornborger, —.

21st. The preponderance of evidence in a case is not however, alone determined by the number of witnesses testifying to a
81 particular fact or state of facts. In determining upon which side the preponderance of testimony is, the jury should take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest if any in the result of the suit, the probability or improbability of the accuracy and certainty of their memory of the events of and concerning which they testify, and in view of all these, when taken in connection with all the other testimony in the case, or upon an issue in the case determine upon which side is the preponderance or weight of the evidence.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

1st. A director or executive officer of a National Bank is responsible for the making and publication of a false report of its financial condition, tho' he did not personally make and publish such statement, if he in any manner participated in the making or publication thereof. A director of a National Bank is presumed to know its true condition and that the law requires true statements of its affairs to be made and published by the Bank from time to time, and if one has been a director or executive officer of such a bank for a long period of time he is presumed to have knowledge of the making and publishing of the statements of its condition, *and the burden is cast upon him to overcome this presumption by competent evidence.*

Requested by plaintiffs.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

2nd. The jury are instructed that inasmuch as the law required that all reports made by a national bank to the Comptroller of the Currency shall be published at the expense of the bank,
82 in a newspaper at the place where the bank is established, you have a right to consider such published reports as have been introduced in evidence in this action purporting to have been signed, and whose names appear in such published reports, as having

been authorized by such defendants, so appearing to have signed the same.

Requested by plaintiffs.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

22nd. You are instructed that if the evidence under the instructions of the court justify it, you may, in each case return a verdict against all of the defendants, or if it does not justify a verdict against all of the defendants, in any or all of such cases, your verdict should be returned only against such defendants as you may find liable under the evidence and instructions. If under the evidence and instructions of the court you should find against any or all of the plaintiffs, you should return a verdict according to such findings.

But you are at liberty, if the evidence so justifies it to omit from either or all of your verdicts, in either or all of said cases, the name of any defendant whom in your judgment is not, under the evidence — instructions of the court liable in the premises.

Three blank verdicts in each case will be furnished you as follows:

One of which in each case is a verdict in favor of the defendants.

One of which in each case finds against all of the defendants.

The other of which in each case in favor of the plaintiffs, has in its blanks which you may fill in with the names of such of the defendants as you may find against.

83 23d. For your convenience in making up your verdicts the court here states to you the full name of each of the defendants named in the several cases as follows:

Charles W. Mosher, George M. Walsh and Warren W. Walsh Administrators of the estate of Homan J. Walsh deceased; Charles E. Yates; Richard C. Outcalt; Louisa Hamer executrix of the estate of Ellis P. Hamer deceased; and David E. Thompson.

24th. You are instructed and you will bear in mind that in case of The Bank of Utica *v.* Mosher, *et al.* and in the case of Thomas Bailey *v.* Mosher, *et al.* David E. Thompson is not a party defendant, and your verdict in those two cases could not be against said Thompson, and in the form of verdicts furnished you, if you should find against all of the defendants as before suggested is omitted the name of Thompson in those two cases. He is, however, a defendant in the other two cases in this action.

25th. At the request of the defendants Walsh Administrators there is submitted for your consideration three questions in each of these cases, to which you should return an answer "Yes" or "No" to each question in each case. The first question is

Did Homan J. Walsh ever qualify or act as a Director of the Capital National Bank?

The second question is

Did Homan J. Walsh ever sign any report of the condition of the Capital National Bank, mentioned in pleadings or shown in the evidence.

Third.

Is Homan J. Walsh shown by the evidence to have actively par-

ticipated in the making of any report of the condition of
84 the Capital National Bank mentioned in the pleadings or shown in evidence.

26th. You are instructed that the second of said questions should be answered "No" since the court has already instructed you that there is no evidence that the said Walsh ever signed any of the reports of the condition of the Capital National Bank.

The First and Third of said questions you will answer "Yes" or "No" according as you shall find from a consideration of the evidence upon either and both of said questions.

27th. When you shall have agreed upon your verdict your foreman should sign the four verdicts (one in each case) conformable to your findings, unless you should find in favor of the plaintiffs and against a part only of the defendants. On the other hand, if you should find in favor of the plaintiffs and against a part only of the defendants it will be necessary for you to insert in the blank left in the verdicts the full name of the defendants against whom you find.

You will also, as before instructed, make the special findings before referred to, and your foreman will sign the four special verdicts, and when you have agreed upon your verdict, and agreed upon the answers to the First and Third questions of the special verdict in each of these cases, you will return with the same into court.

S. H. SORNBORGER, *Judge.*

85 And afterwards, on the 19th day of June 1902, there was entered of record herein the following, to-wit:

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

And now on this June 19, 1902, comes the Court, the above named jurors, the parties to this action, and their respective attorneys, pursuant to adjournment, and the trial proceeds. And said jurors having heard all the testimony, the argument of counsel, the instructions of the Court, retired in charge of the sheriff for deliberation, and on the same day returned into open court the following verdict in writing, and the following special findings in writing on special interrogatories requested on the part of the defendants.

THE STATE OF NEBRASKA, *Seward County, ss:*

May Term, A. D. 1902, to-wit, May 19, 1902.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

We, the jury in this case, being duly impaneled and sworn, do find for the plaintiff, and against the defendants, and we assess the amount of plaintiff's recovery at the sum of ($11054.69) Eleven

Thousand Fifty-Four Dollars and Sixty-Nine Cents, against each and all of the defendants.

J. J. ENDICOTT, *Foreman.*

District Court, Seward County, Nebraska.

86 THOMAS BAILEY
vs.
C. W. MOSHER ET AL.

The Jury will answer the following questions to be signed by your foreman.

1. Did Homan J. Walsh ever qualify or act as a director of the Capital National Bank?

Answer. No.

J. J. ENDICOTT, *Foreman.*

2. Did Homan J. Walsh ever sign any report on the condition of the Capital National Bank mentioned in the pleadings or shown in evidence?

Answer. No.

J. J. ENDICOTT, *Foreman.*

3. Is Homan J. Walsh shown by the evidence to have actively participated in the making of any report of the condition of the Capital National Bank mentioned in the pleadings or shown in evidence?

Answer. Yes.

J. J. ENDICOTT, *Foreman.*

When a mistake has been made in writing a word in the findings, shall we draw a pen through the error in order to make the correction?

Answer. If you have mistakenly written a wrong or unintentional word in a finding it is proper for you to draw a pen through it & insert instead of it the word you desire to return as your answer.

S. H. SORNBORGER, *Judge.*

87 And afterwards, on the same day there was filed in the office of said Clerk the following Requests, to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST
vs.
CHARLES W. MOSHER ET AL.

JONES NATIONAL BANK
vs.
CHARLES W. MOSHER ET AL.

UTICA BANK
vs.
CHARLES W. MOSHER ET AL.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Instructions Requested by Defendants Thompson, Yates, Hamer, and Walsh.

1. The jury are instructed that these actions were brought against C. W. Mosher, President of the Capital National Bank, and R. C. Outcalt, Cashier of said Bank, and against D. E. Thompson, Charles E. Yates, Ellis P. Hamer and R. O. Phillips as directors of said bank, and Homan J. Walsh as Vice President of said bank, the defendants Walsh, Hamer and Phillips have since died; and the estates of Hamer and Walsh are represented in these actions by their administrators. No revivor of the action against R. O. Phillips has been had, and consequently you can not find any verdict against Phillips.

2. All of the foregoing entitled cases are submitted to you for determination at one trial and on the same evidence, so far as such evidence is applicable to the respective cases and to the respective defendants. Each of the defendants makes a separate defense, and each defendant in each of the cases can only be bound or affected in any way by such evidence as may be applicable to him and to his conduct under the charges made in the respective petitions of each case.

3. The jury are instructed that the Capital National Bank was organized under the National Banking Act; such act provided
88 that no less than five persons from among the stockholders of such bank should be elected to act as directors of the bank. As the act was originally passed such directors were required to manage and carry on the banking business in the bank of which they were directors, but under the law as amended in 1874, and as appears in Section 5136 of the National Banking Act, the directors of the Capital National Bank had the power to appoint a President and Cashier to act as the officers and agents of said bank,

and authorize them to carry on the active management of the bank's business.

You are instructed that the oath which the national bank instructor has been required to take under the Act as it first was drawn, to the effect that he would not knowingly violate, or willingly permit to be violated any of the provisions of the National Banking Act, was so changed by the amended Act of 1874, by inserting the words: "so far as the duties devolved on him."

Refused.

Excepted to by J. W. Deweese, Att'y for Walsh Estate & the Def't directors. J. H. Sornborger, Judge.

4. The jury are further instructed that the National Banking Act under which the Capital National Bank was acting during the time alleged in the plaintiff's petitions, it was required to make not less than five reports for each year to the Comptroller of the Currency, and have the same published in a newspaper at the place where the bank was doing business, such report was required to be sworn to by the President or Cashier of the Bank and attested by at least three directors. The assets and liabilities of the bank were required to be listed under the proper heads and according to the form prescribed by the Comptroller, and you are instructed that the reports thus required to be
89 made do not purport to give the value of the assets, nor certify to the solvency of the bank, or the makers of its paper, but simply set forth the resources and liabilities of the bank.

Refused.

Excepted to by J. W. Deweese, Att'y for Walsh Est. & the Def't directors.

5. The jury are instructed that reports of the assets and liabilities of the bank made to the Comptroller and published in a newspaper are not an act of the officers and whole directory of the bank, but simply the act of such officers, who made and swore to the same, and such directors as attested such report; and any director who did not attest such report is not held responsible for anything stated therein.

Refused.

Excepted to by J. W. Deweese, Att'ys for Def'ts Walsh Estate & directors. S. H. Sornbirger, Judge.

6. The jury are instructed that if you find from the evidence introduced in reference to any of the directors named in any one of the said cases that such director did not knowingly violate any of the requirements of the National Banking Act under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant.

Refused.

Exception by J. W. Deweese, for Walsh Estate & the directors. S. H. Sornborger, Judge.

7. If the jury find that the defendant Mosher made a false credit

to the account of the State Treasurer, and made other false entries and manipulations of accounts in the books of the bank, and
90 *and* wrongfully issued certificates of deposit for his own interest and benefit without the knowledge or consent of the directors, which could not by ordinary care and attention in the usual course of the official duties of directors be discovered, then you are instructed that the directors would not be responsible, either collectively or individually for the fact of such false entries and manipulations of the bank's account.

If false entries and manipulations were had and done by defendant Mosher in the use of the books of the bank, that fact would not carry notice to the directors. It would be misuse of words and inconsistent with honest thought to say that because entries were made to conceal the real facts in the books, would bring notice to the directors.

False entries and manipulations of figures in the books purposely kept in the manner to conceal the truth, do not either in law or morals, carry knowledge of such facts. If the defendant Mosher had knowledge of the truth, even though he was president of the bank, his knowledge of his own frauds perpetrated for his individual purposes could not be attributable to the directors of the bank.

Refused.

Excepted to by J. W. Deweese for Walsh Estate & Def't directors.
S. H. Sornborger, Judge.

8. The jury are further instructed that the defendant Mosher, being president of the bank, like any other agent of a corporation, could bind the bank within the scope of his authority; but this principle of law has no application to a case where the president of the bank goes outside of his authority and acts for himself in his own interest and adversely to the interest of the bank of which he is president.

If Mosher acted in fraudulent transactions for his own interest and against the interest of the bank, such act is not within the operation of the rule that the principal for which he is agent is bound by his act; for two reasons:

91 First. In such a case he would be acting for the interest of himself and not for his principal, the bank;

And secondly, he would not communicate to his principal an act of fraud which he was interested in concealing; consequently, it is both unjust and unreasonable and contrary to law to say that the directors of the bank or the bank itself should be bound by such acts.

Refused.

Excepted to by Def't directors & Walsh Estate, J. W. Deweese.
S. H. Sornborger, Judge.

9. The jury are instructed that if you find in these cases that the Comptroller of the Currency furnished printed blanks on which reports were to be made, and the blanks thus printed set forth certain headings and titles under which the assets of said bank were to be listed; and you further find that the accounts in the bank's books were not kept under the same headings and the titles printed in said blanks, and that consequently some of the items kept in the bank's

books had to be reclassified in order to come under the proper heading as printed in the blanks for the making of said reports, then you are instructed that such reclassification of the assets and liabilities of the bank would not in itself make such report false, even if it did not literally agree with the amounts stated under the headings and totals as kept in the bank's books. In other words, if the account were reclassified in order to properly fit the headings of the blank report, this in itself was not the making of a false report. And if when such report was called for, the person or persons making and attesting it, entered under the headings and titles of the prescribed form, a true statement of the bank's assets and liabilities on the day called for, such report fulfilled the demands of the law, and would not be a false report.

Refused.

Excepted to by Def't directors & Walsh estate, J. W. Deweese.
S. H. Sornborger, Judge.

92 10. You are further instructed that a report is not necessarily false, even though it might state an account differently from what it appeared on the books of the bank. If you find that in the making of a report of the resources and liabilities of the bank, the resources were inflated and stated to be larger than they appeared on the bank's books, and the liabilities of the bank were also equally inflated above what they appeared on the bank's books, then you are instructed that such a statement is not material in such a sense as to affect the value or standing of the bank, for the reason that the liabilities of the bank are increased as much as the resources are increased; consequently the bank is in no better condition, and appeared to be in no better condition, where both sides are thus inflated, than it was had there been no inflation on either side of the bank's accounts.

Refused.

Excepted to by Def't, directors & Walsh Estate, J. W. Deweese.
S. H. Sornborger, Judge.

11. The jury are instructed that if you find that one or more of the defendants named in each of said cases have been guilty of negligence, misconduct and fraud, charged in said petitions in the several cases, that fact would not affect any one of the other defendants, nor make such other defendants, or any one of them guilty of such negligence, misconduct and fraud.

In other words, although you may believe from the evidence that one of the defendants named had done and committed or neglected the things charged in the petitions in the several cases under the proof rendered, yet you are instructed that the negligence and misconduct and fraud of each defendant can be attributed to no one of the other defendants without proof that such other defendant, or defendants participated therein.

Refused.

Excepted to by Def't directors & Walsh estate, J. W. Deweese.
S. H. Sornborger, Judge.

93 12. The jury are further instructed that proof that the president or cashier misappropriated or embezzled the funds

of the bank, is not of itself sufficient to establish actionable negligence against directors who are not shown to have participated therein.

Refused.

Excepted to by Def't directors & Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

13. The jury are instructed that the law under which the said bank was organized and operated, provided for bank examiners to be appointed by the Comptroller of the Currency, whose duty it was to examine and make a full and detailed report of the condition of the bank to the Comptroller of the Currency, and the evidence shows in this case that such examinations of the bank were made from time to time, by the regular government bank examiner, during the entire existence of the Capital National Bank.

Refused.

Excepted to by Def't directors & Walsh estate, J. W. Deweese. S. H. Sornborger, Judge.

14. The jury are instructed that the evidence in this case shows that the defendant Mosher was the real party in interest in the management and control of the Western Manufacturing Company; and if you believe from the evidence that he used the notes of the Company in borrowing money, or in endorsing such notes as President of the bank for rediscount, for his own interest and without the knowledge, consent and authority of the Board of Directors of the bank, then you are instructed that the bank would not be liable on such notes.

Refused.

Excepted to by Def't directors & Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

94 15. The jury are instructed that if you find that any notes were issued by the Western Manufacturing Company and endorsed and negotiated by defendant Mosher as President of the Bank, then you are instructed that the bank would not be liable on any of such notes that were not duly and legally protested according to law; and the allowance of claims on such illegal notes by the Receiver of said bank is immaterial in the consideration of this case, and does not change the fact that the bank was not liable on the same.

Refused.

Excepted to by Def't Directors and Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

16. The jury are instructed that in each of the above entitled cases, the cause of action in each, so far as the published reports are concerned, is based upon the two reports set out in the petitions, to-wit: The report of December 28, 1886, and the report of December 9, 1892.

Refused.

Excepted to by Def't directors & Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

17. The jury are further instructed that if any liability ever existed against any of the defendants on account of the making and

publishing of the report of December 28, 1886, such liability is barred by the statute of limitations, and no recovery can be had in this action on account thereof.

Refused.

Excepted to by def't directors and Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

18. The jury are instructed that in considering the various charges and allegations made against each defendant in the several cases submitted to you, you are not to arrive at any conclusion or determine any fact by mere conjecture or speculation; and you
95 are further instructed that the burden of proof is upon the plaintiff to establish the facts alleged against any defendant in these several actions; and you must determine such fact from the evidence relating to such charges and facts; and not determine the same by inference, conjecture or guess-work.

Refused.

Excepted to by Def't Directors and Walsh Estate. S. H. Sornborgor, Judge.

19. The jury are instructed that Homan J. Walsh, who was vice-president of the said bank, never signed any of the reports to the Comptroller which were published in the newspapers; and you are therefore instructed to find a verdict in his favor, as he is not liable for anything stated in such reports.

Refused.

Excepted to by Defendant directors & Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

20. The jury are instructed that in considering the various charges and allegations made against each defendant in the several cases submitted to you, you arr not — arrive at any conclusion or determine any fact by mere conjecture or speculation; and you are further instructed that the burden of proof is upon the plaintiff to establish the facts alleged against any defendant in these several actions; and you must determine such facts by the positive proof relating to such charges and facts, and not determine the same by inference, conjecture or guess-work.

Refused.

Excepted to by Def't Directors & Walsh Estate, J. W. Deweese. S. H. Sornborger.

96 And afterwards, on the 19th day of June, 1902, there was filed herein the following paper, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

1. The jury are instructed in this case that the defendants are not jointly liable to the plaintiff, and each defendant has made a separate defense to the claim made in the plaintiff's petition.

You are instructed that under the issues in this case and the evidence that *have* been ad-uced on the trial thereof, the plaintiff is not entitled to recover a verdict against the defendants George M. Walsh and Warren W. Walsh, as administrators of the Estate of Homan J. Walsh, deceased; and you are therefore instructed to return a verdict in favor of said defendants George M. Walsh and Warren W. Walsh, as administrators of the Estate of Homan J. Walsh, deceased.
deceased.
Refused.
Excepted to by Def't Walsh, Adm. J. W. Deweese. S. H. Sornborger, Judge.

And afterwards, on the 19th day of June, 1902, there was filed herein the following paper, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

1. The jury are instructed in this case that the defendants are not jointly liable to the plaintiff, and each defendant has made a separate defense to the claim made in the plaintiff's petition.
97-115 You are instructed that under the issues in this case and the evidence that has been adduced on the trial thereof, the plaintiff is not entitled to recover a verdict against the defendant Elizabeth Hamer, administratrix of the Estate of Ellis P. Hamer, deceased; and you are therefore instructed to return a verdict in favor of the said defendant Elizabeth Hamer, administratrix of the Estate of Ellis P. Hamer, deceased.
Refused.
Excepted to by Def't Hamer, Admi'x, J. W. D. S. H. Sornborger, Judge.

And afterwards, on the 19th day of June 1902, there was filed herein the following paper, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

1. The jury are instructed in this case that the defendants are not jointly liable to the plaintiff, and each defendant has made a separate defense to the claim made in the plaintiff's petition.
You are instructed that under the issues in this case and the evidence that has been adduced on the trial thereof, the plaintiff is not entitled to recover a verdict against the defendant Charles E. Yates;

and you are therefore instructed to return a verdict in favor of the said defendant Charles E. Yates.

Refused.

Excepted to by Def't Yates. J. W. Deweese. S. H. Sornborger, Judge.

* * * * * * *

116 And afterwards, on the 21st of June, 1902, there was filed in the office of said clerk a certain Motion in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Motion for New Trial.

Now comes the defendant Louisa Hamer, Administratrix of the estate of Ellis P. Hamer, deceased, and moves the court to set aside the verdict rendered by the jury against her in the above entitled cause and grant a new trial therein, for the following reasons;

1st. That said cause of action had been duly and legally removed to the federal court, on account of the federal questions in-
117 volved, as shown in the plaintiff's petition; and this court had no jurisdiction or power under the law to proceed further with the trial of said cause.

2nd. The court erred in the admission of any testimony over the objection of this defendant, for the reason that under the cause of action set forth in the plaintiff's petition, being one to recover damages on account of the negligence, misconduct and mismanagement of the bank on the part of this defendant intestate the plaintiff is not, as a matter of law, entitled to recover.

3rd. The damages alleged in the plaintiff's petition, if any existed on account of the charges made in said petition, could only be recovered by the bank or by the receiver, and ratably distributed among all the creditors and stockholders of said bank, and could not be recovered by the plaintiff for self individually.

4th. The court erred in taking jurisdiction of said cause and the hearing of proof under the allegations of the plaintiff's petition over the objection of this defendant, for the reason that the duties and liabilities of this defendant's intestate as director of the Capital National Bank are governed and controlled by the national banking act, under which said bank was organized, and for which this defendant'-intestate was acting in the capacity of director and the damage growing out of mismanagement negligence or fraud of this deefndant's intestate as charged in said petition, if such existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the national

banking act and the liabilities of said defendant's intestate under said act as director of said bank.

5th. The court erred in failing to give faith and credit to the judgment of the United States Court, rendered in this case.

6th. The court erred in refusing to receive in evidence the
118 record of the former adjudication of the plaintiff's claim against the defendant.

7th. The petition in said cause does not state a cause of action against this defendant.

8th. For errors of law occurring at the trial and excepted to by the defendant.

9th. The verdict is contrary to law.

10th. The verdict is contrary to the evidence and is not supported by sufficient evidence.

11th. The court erred in refusing to give instruction numbered 1, requested by this defendant.

12th. The court erred in refusing to give instruction numbered 3, requested by this defendant.

13th. The court erred in refusing to give instruction numbered 4, requested by this defendant.

14th. The court erred in refusing to give instruction numbered 5, requested by this defendant.

15th. The court erred in refusing to give instruction numbered 6, requested by this defendant.

16th. The court erred in refusing to give instruction numbered 7, requested by this defendant.

17th. The court erred in refusing to give instruction numbered 8, requested by this defendant.

18th. The court erred in refusing to give instruction numbered 9, requested by this defendant.

19th. The court erred in refusing to give instruction numbered 10, requested by this defendant.

20th. The court erred in refusing to give instruction numbered 11, requested by this defendant.

21st. The court erred in refusing to give instruction numbered 12, requested by this defendant.

119 22d. The court erred in refusing to give instruction numbered 13, requested by this defendant.

23rd. The court erred in refusing to give instruction numbered 14, requested by this defendant.

24th. The court erred in refusing to give instruction numbered 15, requested by this defendant.

25th. The court erred in refusing to give instruction numbered 16, requested by this defendant.

26th. The court erred in refusing to give instruction numbered 17, requested by this defendant.

27th. The court erred in refusing to give instruction numbered 18, requested by this defendant.

28th. The court erred in refusing to give instruction numbered 19, requested by this defendant.

29th. The court erred in refusing to give instruction numbered 20th, requested by this defendant.

30th. The court erred in giving the third instruction on its own motion, to the jury, numbered 3.

31st. The court erred in giving the second fourth instruction on its own motion, to the jury, numbered "second 4.

32d. The court erred in giving the fifth instruction on its own motion, to the jury, numbered 5.

33d. The court erred in giving the sixth instruction on its own motion, to the jury, numbered 6.

34th. The court erred in giving the seventh instruction on its own motion, to the jury, numbered 7.

34th. The Court erred in giving the eighth instruction on its own motion, to the jury, numbered 8.

35th. The court erred in giving the ninth instruction on its own motion, to the jury, numbered 9.

36th. The court erred in giving the tenth instruction on its own motion to the jury, numbered 10.

120 37th. The court erred in giving the eleventh instruction on its own motion, to the jury, numbered 11.

38th. The court erred in giving the twelfth instruction on its own motion, to the jury, numbered 12.

39th. The court erred in giving the thirteenth instruction on its own motion, to the jury, numbered 13.

40th. The court erred in giving the fourteenth instruction on its own motion, to the jury, numbered 13.

42d. The court erred in giving the fifteenth instruction on its own motion, to the jury, numbered 15.

43d. The court erred in giving the sixteenth instruction on its own motion, to the jury, numbered 16.

44th. The court erred in giving the seventeenth instruction on its own motion, to the jury, numbered 17.

45th. The court erred in giving the eighteenth instruction on its own motion, to the jury, numbered 18.

46th. The court erred in giving the nineteenth instruction on its own motion, to the jury, numbered 19.

47th. The court erred in giving the twentieth instruction on its own motion, to the jury, numbered 20.

48th. The court erred in giving the twenty-first instruction on its own motion, to the jury, numbered 21.

49th. The court erred in giving the first instruction requested by plaintiff, numbered 1st.

50th. The court erred in giving the second instruction requested by plaintiff, numbered 2nd.

J. W. DEWEESE,
Attorney for said Def't.

And afterwards, on the 21st day of June, 1902, there was filed in the office of said Clerk a certain Motion in words and figures following, to-wit:

121 In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Motion for New Trial.

Now comes the defendant Charles E. Yates and moves the court to set aside the verdict rendered by the jury against him in the above entitled cause and grant a new trial therein, for the following reasons:

1st. That said cause of action had been duly and legally removed to the federal court, on account of the federal questions involved, as shown in the plaintiff's petition; and this court had no jurisdiction or power under the law to proceed further with the trial of said cause.

2nd. The court erred in the admission of any testimony over the objection of this defendant, for the reason that under the cause of action set forth in the plaintiff's petition, being one to recover damages on account of the negligence, misconduct and mismanagement of the bank on the part of this defendant the plaintiff is not, as a matter of law, entitled to recover.

3rd. The damage alleged in the plaintiff's petition, if any existed on account of the charges made in said petition, could only be recovered by the bank by the receiver, and ratably distributed among all the creditors and stockholders of said bank, and could not be recovered by the plaintiff for himself individually.

4th. The court erred in taking jurisdiction of said — and the hearing of proof under the allegations of the plaintiff's petition over the objection of the defendant, for the reason that the duties and liabilities of this defendant as a director of the Capital National Bank are governed and controlled by the national banking act, under which said bank was organized, and for which this defendant was acting in the capacity of a director; and the damage growing
122 out of the mismanagement negligence or fraud of this defendant as charged in said petition, in the same existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the national banking act and the liabilities of said defendant under said act as a director of said bank.

5th. The court erred in failing to give full faith and credit to the judgment of the United States Court, rendered in this case.

6th. The court erred in refusing to receive in evidence the record of the former adjudication of the plaintiff's claim against the defendant.

7th. The petition in said cause does not state a cause of action against this defendant.

8th. For error of law occurring at the trial and excepted to by this defendant.

9th. The verdict is contrary to law.

10th. The verdict is contrary to the evidence and is not supported by sufficient evidence.

11th. The court erred in refusing to give instruction numbered 1, requested by this defendant.

12th. The Court erred in refusing to give instruction numbered 3, requested by this defendant.

13th. The court erred in refusing to give instruction numbered 4, requested by this defendant.

14th. The court erred in r-fusing to give instruction numbered 5, requested by this defendant.

15th. The court erred in refusing to give instruction numbered 6, requested by this defendant.

16th. The court erred in refusing to give instruction numbered 7, requested by this defendant.

17th. The court erred in refusing to give instruction num-
123 bered 8, requested by this defendant.

18th. The court erred in refusing to give instruction numbered 9, requested by this defendant.

19th. The court erred in refusing to give instruction numbered 10, requested by this defendant.

20th. The court erred in refusing to give instruction numbered 11, requested by this defendant.

21st. The court erred in refusing to give instruction numbered 12, requested by this defendant.

22d. The court erred in refusing to give instruction numbered 13, requested by this defendant.

23d. The court erred in refusing to give instruction numbered 14, requested by this defendant.

24th. The court erred in refusing to give instruction numbered 15, requested by this defendant.

25th. The court erred in refusing to give instruction numbered 16, requested by this defendant.

26th. The court erred in refusing to give instruction numbered 17, requested by this defendant.

27th. The court erred in refusing to give instruction numbered 18, requested by this defendant.

28th. The court erred in refusing to give instruction numbered 19, requested by this defendant.

29th. The court erred in refusing to give instruction numbered 20th, requested by this defendant.

30th. The court erred in giving the third instruction on its own motion, to the jury, numbered 3.

31st. The court erred in giving the second fourth instruction on its own motion, to the jury, numbered second 4.

32d. The court erred in giving the fifth instruction on its own motion, to the jury, numbered 5.

124 33d. The court erred in giving the sixth instruction on its own motion to the jury, numbered 6.

34th. The court erred in giving the seventh instruction on its own motion, to the jury, numbered 7.

35th. The court erred in giving the eighth instruction on its own motion, to the jury, numbered 8.

36th. The court erred in giving the ninth instruction on its own motion, to the jury, numbered 9.

37th. The court erred in giving the tenth instruction on its own motion, to the jury, numbered 10.

38th. The court erred in giving the eleventh instruction on its own motion, to the jury, numbered 11.

39th. The court erred in giving the twelfth instruction on its own motion, to the jury, numbered 12.

40th. The court erred in giving the thirteenth instruction on its own motion, to the jury, numbered 13.

41st. The court erred in giving the fourteenth instruction on its own motion, to the jury, numbered 14.

42d. The court erred in giving the fifteenth instruction on its own motion, to the jury, numbered 15.

43d. The court erred in giving the sixteenth instruction on its own motion, to the jury, numbered 16.

44th. The court erred in giving the seventeenth instruction on its own motion, to the jury, numbered 17.

45th. The court erred in giving the eighteenth instruction on its own motion, to the jury, numbered 18.

46th. The court erred in giving the nineteenth instruction on its own motion, to the jury, numbered 19.

47th. The court erred in giving the twentieth instruction on its own motion, to the jury, numbered 20.

48th. The court erred in giving the twenty-first instruction on its own motion, to the jury, numbered 21.

125 49th. The Court erred in giving the first instruction requested by plaintiff, numbered 2nd.

50th. The court erred in giving the second instruction requested by plaintiff, numbered 2nd.

J. W. DEWEESE,
Att'y for said Def't.

* * * * * * *

126 And afterwards, on the 21st day of July, A. D. 1902, there was had herein the following order of Court, to-wit:

In the District Court of Seward County, Nebraska.

No. 1794.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Be it remembered, that on this 21st day of July, A. D., 1902 it being a day of the regular May 1902 term of the District Court, this cause came on for hearing on the motion of the defendants George M. Walsh and Warren W. Walsh as administrators of the

estate of Homan J. Walsh, deceased, for judgment in their favor on the special findings of the jury, notwithstanding the general verdict of the jury against them. And the Court being fully advised in the premises sustains said motion to which the plaintiff excepts.

And thereupon and on said same day this cause came on further to be heard on the separate motions for new trial of defendants Charles E. Yates, Charles W. Mosher, Richard C. Outcalt and Louisa Hamer as executrix of the last will and testament of Ellis P. Hamer, deceased, and the same being argued and submitted to the Court, and the Court being fully advised in the premises, on consideration thereof does overrule each and all of said defendants' motions for new trial, to which said defendants severally except.

It is therefore considered and adjudged by the Court that the defendants George M. Walsh and Warren W. Walsh as administrators of the estate of Homan J. Walsh, deceased, go hence without day.

It is therefore considered and adjudged that said defendants Walsh as administrators &c., recover judgment against pl'ff, for his costs.

127 It is further considered and adjudged that the plaintiff recover from the defendants Charles E. Yates, Charles W. Mosher, Richard C. Outcalt and Louise Hamer as executrix of the last will and testament of Ellis P. Hamer, deceased, and each of them, jointly and severally the sum of $11,054.69 with 7% interest from this date, and costs herein taxed at $——.

Defendants are allowed forty days from the rising of the court in which to settle bill of exceptions.

It is furthered ordered that no execution issue on this judgment until after sixty days from date.

And afterwards, on Aug. 4., 1902, the following motion was made herein, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
C. W. MOSHER ET AL.

Now comes the defendants and move the court to correct the verdict rendered in the above entitled cause, and to correct the judgment rendered therein, so far as the same relates to the amount of recovery, and in this case to correct the judgment so that the amount of the judgment with interest to April 21, 1902, will be the sum of $8,573.22 for the reasons:

1st. The amount of the verdict was not determined by the jury but was simply furnished to the jury by the plaintiff's counsel and the court, subject to be corrected afterward, according to the fact, if the same was wrong, as set forth in the affidavit hereto attached and made part hereof.

J. W. DEWEESE &
H. F. ROSE,
Att'ys for Def'ts Thompson, Yates, and Hamer.

128 In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
C. W. MOSHER ET AL.

STATE OF NEBRASKA, *Lancaster County, ss:*

H. F. Rose and J. W. Deweese being duly sworn, say that they were attorneys for the defendants in the above entitled cause.

That counsel for the plaintiff asked the court to instruct the jury that if they found for the plaintiff to return a verdict in favor of the plaintiff for the amount which the plaintiff had figured up as the correct amount in case the jury decoded for the plaintiff. As the correct figuring of the amount of this verdict on which judgment should be rendered, involved a good deal of work and time, it was announced in open court by the court in the presence of the jury and to the attorneys on both sides of the controversy, that he himself would write *in* the amount which the plaintiff had furnished as the correct amount, into the verdict for the jury to return in case they found for the plaintiff, and that such amount could be corre*t*ced or changed later on if it was incorrect, and after the defendants had had time and opportunity to figure over the claims, with interest, and the credits to be deducted, and determine whether the amount so furnished by the plaintiff's counsel to the court was correct or not.

Affiants further say that they have had no sufficient time to make the proper figuring of the amount that should be entered into the verdict; but *they* they have had the claims with credits and interest, carefully and properly figured since, and find that the amount

129 entered in the verdict in this case is incorrect and excessive, and that judgment was entered by the court on July 21, 1902 on the verdict rendered for $11,054.69 whereas the true amount that the plaintiff would be entitled to recover, if at all, with interest at 6%, was and is the sum of $8,573.22.

H. F. ROSE.
J. W. DEWEESE.

Sworn to before me and subscribed to in my presence by J. W. Deweese & H. F. Rose this Aug. 2, 1902.

[SEAL.] WM. B. KERBY,
Notary Public.

And afterwards, on September 24th, 1902, there was filed with the Clerk of said Court, Bill of Exceptions herein, consisting of Vol. I, Vol. II, Vol. III, the same being herewith transmitted.

And afterwards, on the 22nd day of October, being a day in the regular May, 1902, term of said District Court the following Order of the Court was had herein, to-wit:

In the District Court of Seward County, Nebraska.

JONES NATIONAL BANK
v.
MOSHER ET AL.

STAPLEHURST BANK
v.
MOSHER & Others.

UTICA BANK
v.
MOSHER & Others.

BAILEY
v.
MOSHER & Others.

Order for Remittitur.

It having been made to appear by Computations that the verdicts heretofore found by the jury in the above several cases was & are each excessive, and that the true sums due upon each several
130 claim, with interest was severally as follows:

To the	Jones National Bank	$16,444.63
" "	Staplehurst Bank	13,163.54
" "	Utica Bank	8,111.29
" "	Thomas Bailey	9,682.37

And counsel for all the parties in said causes having agreed that the foregoing are true computations, severally, and should be substituted, in the place of the sums ascertained by the jury & included in the several verdicts, Now therefore,

It is ordered that plaintiffs may and they are hereby ordered to file a remittitur in each of said several cases, of the difference between the amount, severally, above stated and the amount named in the verdict, and that thereupon the Clerk may enter judgment, in pursuance of the verdict, in each of said cases for the amount- above severally set forth.

S. H. SORNBORGER, *Judge.*

There was also entered of record of the same day the following Journal Entry, to-wit:

In the District Court of Seward County, Nebraska.

No. 1794.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Be it remembered, that on this 22nd day of October, 1902, being a day in the regular May, 1902, term of the District Court, this cause came on for hearing on the motion of Charles E. Yates and Louisa Hamer, as executrix of the last will and testament of Ellis P. Hamer, deceased, to correct and amend the judgment heretofore entered in this cause.

And it appearing to the Court that the amount of the verdict and judgment in this cause is excessive, and that the amount
131 thereof should be reduced from $11,054.69 to $9,682.37, and the plaintiff appearing in open court and consenting to said remittitur.

It is therefore ordered and adjudged that the amount of said judgment be and is hereby reduced to $9,682.37, and that as thus modified the said judgment be and is hereby affirmed, and execution is awarded therefor.

And afterwards, on November 13th, 1902, there was filed herein a certain Remittitur, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

Remittitur.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

The verdict in this cause for the sum of $11054.69 as returned by the jury, being excessive in the sum of $1372.32, and the plaintiff having been ordered and permitted by the court to enter remittitur in that amount.

The plaintiff therefore hereby remits from the verdict as returned by the jury the sum of $1372.32, so that the verdict in his favor may be reduced to the sum of $9682.37, in accordance with the order of the court.

THOMAS BAILEY,
By R. S. NORVAL &
J. J. THOMAS, *His Att'ys.*

THE STATE OF NEBRASKA, *Seward County, ss:*

I, J. M. Calder, Clerk of the District Court in and for Seward County, Nebraska, do hereby certify that the foregoing is a full, true

and complete transcript of the following papers filed in the
132 case of Thomas Bailey Plaintiff, against Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, David E. Thompson, Richard C. Outcalt and Rollo O. Phillips, Defendants, to-wit: Original Summons served on A. P. S. Stuart, in Seward County, and on the other defendants in Lancaster County, with return thereon, Amended Petition filed on March 16, 1899, the Demurrer of all defendants to said Amended Petition, the ruling of the Court on said demurrer; Answer of Administrators of the Estate of Homan J. Walsh, deceased; separate Answer of Charles E. Yates & Ellis P. Hamer; Answer of Charles W. Mosher; Answer of Richard C. Outcalt; Reply to separate Answer of the Administrators of Homan J. Walsh, deceased; Reply to Separate Answer of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher and Richard C. Outcalt; All the Stipulations filed on May 29th, 1902; All Journal entries and orders of Court had of record during said term of Court in said case; The Instructions, and Special Instructions to the Jury; Instruction requested by the defendants and refused by the Court; Motions for New Trial by Richard C. Outcalt, Charles W. Mosher, Administrators of the Walsh Estate; Administratrix of the Ellis P. Hamer, Estate; and Charles E. Yates; Motion for judgment in favor of defendants Walsh, notwithstanding the verdict of the Jury; the motion to correct the amount of judgment found by the jury herein, and the Remittitur filed for such corrections.

I also certify that the bill of exceptions herewith transmitted are the original Bill of Exceptions filed herein, consisting of three volumns, and that I have received the sum of $27.90 from the defendants for this transcript.

In witness whereof I hereunto set my hand and affix the seal of this Court this 15th day of November, 1902.

[SEAL.] J. M. CALDER,
Clerk District Court.

133–134 Endorsed: 13032. Charles E. Yates *et al., vs.* Thomas Bailey. Transcript. Supreme Court of Nebraska. Filed Nov. 28, 1902. Lee Herdman Clerk.

* * * * * * *

135 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Motion in words and figures following, to-wit:

In the Supreme Court, State of Nebraska.

CHARLES E. YATES and LOUISA HAMER, Administratrix, Plaintiffs in Error,

vs.

UTICA BANK and THOMAS BAILEY, Defendants in Error,

and

DAVID E. THOMPSON, Plaintiff in Error,

vs.

BANK OF STAPLEHURST and THE JONES NATIONAL BANK, Defendants in Error.

Now comes the plaintiffs in error in each of the above cases and moves the court to make an order on the Clerk of this court directing said Clerk to file the Bill of Exceptions in said cases consisting of three columns, not only in the above entitled cases but also in the cases as follows:

Charles E. Yates *vs.* Jones National Bank, Charles E. Yates *vs.* The Bank of Staplehurst, Charles E. Yates *vs.* Thomas Bailey, Louisa Hamer, administratrix *vs.* Thomas Bailey, Louisa Hamer, Administratrix *vs.* The Jones National Bank, Louisa Hamer, Administratrix *vs.* Utica Bank, David E. Thompson *vs.* Bank of Staplehurst, David E. Thompson *vs.* Jones National Bank, for the reason that all of said cases were tried at one time, before the same court, and the same jury, on the same evidence as shown in the Bill of Exceptions by direction of the trial court and in accordance with the stipulation of the parties, to said cases, as follows:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST, Plaintiff,

vs.

CHARLES W. MOSHER ET AL., Defendants.

THE JONES NATIONAL BANK, Plaintiff,

vs.

CHARLES W. MOSHER ET AL., Defendants.

136 UTICA BANK, Plaintiff,

vs.

CHARLES W. MOSHER ET AL., Defendants.

THOMAS BAILEY, Plaintiff,

vs.

CHARLES W. MOSHER ET AL., Defendants.

Stipulation.

The parties to this stipulation in each of the above entitled causes which are now pending in the District Court of Seward County, Nebraska, hereby stipulate and agree that all

of said causes shall be tried in the District Court at one and the same time, and that the evidence proper and applicable to any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, subject of course to the objections of either of the parties to this stipulation and governed by the ruling of the court, shall be offered and produced and the cases respectively disposed of by court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence insofar as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation, shall be considered by the jury in such cases in the disposition thereof; such evidence being properly applied to any one or to all of the parties to this stipulation as the facts of the *court* may warrant.

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in such case may be received and that then the whole evidence as thus introduced shall
137 be properly applied to each respective case and to each respective party thereto under the rulings and directions of the court, subject to the objections of either party.

It is therefore agreed that if either party or any party to any of said causes represented in the stipulation shall desire to prosecute error from the judgment of the District Court in any or all of said cases, a transcript of the testimony given on the trial of all of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one Bill of Exceptions and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases, and that the Bill of Exceptions settled in one case shall be the Bill of Exceptions in each and all of said cases.

In Witness Whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,
J. J. THOMAS,
Attorneys for Plaintiffs.
H. F. ROSE AND
J. W. DEWEESE,
Attorneys for D. E. Thompson.
J. W. DEWEESE,
Att'y for Def'ts Yates, Walsh Estate, & Hamer Estate.
CHAS. O. WHEDON,
Attorney for Chas. W. Mosher and R. C. Outcalt.

H. F. ROSE AND
J. W. DEWEESE,
Att'ys for Pl'ffs in Error.

Endorsed: C. E. Yates Pl'ff in Error *vs.* Utica Bank, *et al.*, 13030 13031–32 and 33. Charles E. Yates, *et al.*, *vs.* Jones Nat. Bank *et al.* Motion *in re* Bill of Exceptions. Supreme Court of Nebraska. Filed Nov. 28 1902. Lee Herdman Clerk.

138 And afterwards, to-wit, on the 2nd day of December, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Order in the words and figures following, to-wit:

No. 13030.

CHARLES E. YATES, LOUISA HAMER, Administratrix, and DAVID E. THOMPSON, Plaintiffs in Error,

v.

THE JONES NATIONAL BANK, Defendants in Error.

No. 13031.

CHARLES E. YATES, LOUISA HAMER, Administratrix, ET AL., Plaintiffs in Error,

v.

UTICA BANK, Defendant in Error.

No. 13032.

CHARLES E. YATES, LOUISA HAMER, Administratrix, ET AL., Plaintiffs in Error,

v.

THOMAS BAILEY, Defendant in Error.

No. 13033.

CHARLES E. YATES, LOUISA HAMER, Administratrix, and DAVID E. THOMPSON, Plaintiffs in Error,

v.

THE BANK OF STAPLEHURST, Defendant in Error.

Now on this 2nd day of December, 1902, the motion filed by the several plaintiffs in error in each one of the above entitled causes of action, came on for hearing, and on due consideration the Court sustains the said motion in each of the causes.

It is, therefore, ordered and adjudged that the Clerk be ordered and is hereby directed to file the one bill of exceptions
139–196 resulting from the trial of said several causes in each of said several causes to be for the use and benefit of each of the said several plaintiffs in error as the original bill of exceptions in each one of said causes.

It is further ordered that the stipulation made by and between the parties to the said several suits for the trial of said several causes at one time before one jury and for the use of one bill of exceptions if either party desired to have the judgment of the lower court reviewed, shall be and is hereby ordered to be considered as a part of the bill

of exceptions, although it is attached in fact to the Clerk's transcript of the record, in the disposition of the said several causes, shall be used and considered a part of the bill of exceptions.

* * * * * * *

197 And afterwards, to-wit: on the 17th day of November, 1903, the following proceedings were had and done, to-wit:

The following causes were argued and submitted.
No. 13032. Yates *v.* Bailey. Error to Seward County.

And afterwards, to-wit, on the 17th day of March, 1904, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Order in words and figures following, to-wit:

No. 13032.

CHARLES E. YATES ET AL., Plaintiffs in Error,
v.
THOMAS BAILEY *et al.*, Defendants in Error.

Error to the District Court, Seward County.

Upon motion of the Court it is ordered that this cause be called for further argument of counsel April 19, A. D. 1904.

And afterwards, to-wit, on the 19th day of April, 1904, the following among other proceedings were —:

The following causes were reargued and submitted to the Court.
No. 13032. Yates *v.* Bailey. Error to Seward County.

And afterwards, to-wit, on the 19th day of October, 1905, there was rendered by said Supreme Court and entered of record upon the journal a certain Judgment in words and figures following, to-wit:

198 No. 13032.

CHARLES E. YATES ET AL., Plaintiffs in Error,
v.
THOMAS BAILEY, Defendants in Error.

Error to the District Court of Seward County.

This cause coming on to be heard upon proceedings in error to the district court of Seward County, was argued by counsel and submitted to the court; upon full consideration whereof, the court doth find no error apparent in the record of the proceedings and judgment of said district court, and it is therefore considered, ordered and adjudged that the judgment of said district court be, and the same hereby is affirmed; that defendant in error pay all costs in-

curred herein by him taxed at $—, and have and recover from plaintiffs in error all his costs so expended herein; that plaintiffs in error pay all costs incurred herein by them, taxed at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

And on the same day there was filed in the office of the Clerk of the said Supreme Court a certain Opinion, by said Court, pursuant to which the preceding judgment was rendered, which Opinion is in the words and figures following, to wit:

199

No. 13030.

YATES
v.
JONES NATIONAL BANK.

No. 13031.

YATES
v.
THE UTICA BANK.

No. 13032.

YATES
v.
BAILEY.

No. 13033.

YATES
v.
THE BANK OF STAPLEHURST.

Opinion.

Filed October 19, 1905.

Commissioner's Opinion, Department No. 2.

1. Damages resulting to a national bank, from the misfeasance or mismanagement of its officers, are assets of the bank and are recoverable only in an action brought by the bank or for the benefit of all the stockholders and creditors thereof.
2. The officers of a national bank are personally liable for false reports made and published by them, in pursuance of Sec. 5211, Rev. Stat. U. S., to the party injured thereby and the right of the injured party to maintain the action does not rest on the federal statute but the common law.

3. It is no defense to an action of that character that such reports were made and published by the officers without knowledge of their falsity. Following Gerner *v.* Mosher, 58 Nebr., 135.
4. A cause of action, once finally determined between the parties on the merits, can not afterward, so long as such judgment remains in force, be litigated by new proceedings, either before the same or some other tribunal.
5. The foregoing rule applies, not only to judgments which are the result of a trial of issues of fact, but also to judgments on demurrer, where such judgments go to the merits of
200 the case; but a judgment on a demurrer, which is based on a technical defect of pleading, lack of jurisdiction, or the like, does not involve the merits of the controversy, and will not support the plea of *res judicata.*
6. The voluntary dismissal of an action, before final submission, does not operate as an estoppel, and is without prejudice to a future action.
7. Under our practice the common law rule, making the payment of costs in the action dismissed a prerequisite to the prosecution of another, is one which the trial court in the exercise of a sound discretion may or may not apply.
8. Evidence examined, and held sufficient to sustain the findings of the jury.

201 ALBERT, *C.:*

In 1893, the Jones National Bank and the Bank of Staplehurst each brought an action against Charles W. Mosher, Homer E. Walsh, David E. Thompson, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt and Rollo O. Phillips; and Thomas Bailey and the Utica Bank, each brought an action against all of the said defendants except David E. Thompson. The actions were brought in the district court of Lancaster county, and the several petitions so far as the present inquiry is concerned are substantially the same, and the allegations are, in effect, as follows: That from the 9th day of December, 1886, to the 21st day of January, 1893, the Capital National Bank, of Lincoln, was a corporation duly organized, existing under and by virtue of the banking laws of the United States, that the defendants were the directors and officers thereof, and, as such, had exclusive control and management of its affairs. That during the whole of said period the Bank was insolvent, as the defendants well knew, or, by the exercise of due diligence would have known, and, that on or about the 23rd day of January, 1893, it passed into the hands of a receiver, who, at the commencement of the action, was in possession of all of its assets. That from the 9th day of December, 1886, to the date such bank passed into the hands of the receiver, the defendants, in pursuance of the banking laws of the United States and on the demand of the comptroller of the currency, from time to time made statements, and caused and permitted statements to be made, to the comptroller of the currency purporting to show the financial condition of such bank at the time such statements were respectively

made, and caused such statements to be published in certain newspapers of general circulation in this state. That the defend-
202 ants, although chargeable with knowledge of the true condition of said bank, and that it was not in a prosperous condition, but insolvent when such reports were respectively made, for the purpose of deceiving the plaintiff and others and thereby inducing them to deposit their money in said bank, made out and caused said statements to be made in such a way as to show that the bank was in a prosperous condition and that it was safe and solvent. That such statements were brought to the notice of the plaintiff, and, that relying thereon and believing them to be true, the plaintiff, induced thereby, made certain deposits in the said bank before it passed into the hands of the receiver. That if each of the defendants did not have actual knowledge of the false and fraudulent character of such statements, and of the actual condition of the bank when such statements were made, his lack of knowledge was the result of his gross negligence in respect to his duties as an officer of the bank. Then follow allegations to the effect that the defendants, as officers of such bank, had loaned sums of money and had allowed and paid dividends to its stockholders while the bank was insolvent, contrary to and in violation of the banking laws of the United States. The concluding allegations are as follows:

"* * * and by reason of the several violations of the banking law as above set forth by these several defendants they have become and are liable to this plaintiff for the damages he has sustained by reason of their acts in the sum of $11,500, together with interest thereon from the 11th day of October to the 28th day of December, 1892, at the rate of seven per cent per annum."

In each case the defendants demurred on four grounds: (1) Want of jurisdiction of subject matter. (2) Plaintiff's want of legal capacity to sue. (3) Defect of parties plaintiff. (4) Insufficiency of the facts stated to constitute a cause of action.
203 The defendants also filed petitions, asking the removal of the causes to the federal court, for the reason that the actions involved a construction of the National Banking Act. The causes, were removed, and thereupon the plaintiff filed motions in the federal court, asking that the causes be remanded, for the reason that they involved no federal question. The motion was overruled.

In the action brought by the plaintiff Bailey the federal court sustained the demurrer to his petition and dismissed the case. Bailey prosecuted error to the Circuit Court of Appeals, when the rulings of the lower court on the motion to remand and the demurrer to the petition were sustained, and the judgment of dismissal was affirmed (Bailey *v.* Mosher, 63 Fed., 488) whereupon the other plaintiffs dismissed their actions.

Thereafter, the plaintiffs each brought an action against the parties they had respectively made defendants before, in the district court of Seward county. The petitions, in the latter cases, as they stood at the time of the trial, are substantially the same as those in the former, save that it is not alleged in

the latter that the Capital National Bank was organized under the laws of the United States, nor that the statements therein mentioned, purporting to show the financial condition of said bank, was made in pursuance of the banking laws of the United States or on the demand of or to the comptroller of the currency. The concluding of the latter petitions *are* as follows:

"Plaintiff states that by reason of the facts as above set forth and the false and fraudulent statements, advertisements, and representations of the defendants the plaintiff has been damaged in the sum of Twenty Thousand ($20,000) Dollars."

On the application of the defendants, the case of Bailey *v.* Mosher, *et al.* was removed to the U. S. Circuit Court, on the
204 theory that it was brought under the United States Banking Act for misfeasance or mismanagement of the defendants, as officers of a national bank. On motion of the plaintiff, the Circuit court remanded the cause to the state court, holding that no federal question was involved. Bailey *v.* Mosher, *et al.*, 74 Fed., 15.

When the cause again reached the state court, the several petitions were amended by interlineation, whereby they were brought to their present form. Whereupon on application of the defendants, the cases were removed to the U. S. Circuit Court, on the theory that the amendment had injected a federal question. The Circuit Court overruled a motion to remand, sustained a demurrer to the petition and dismissed the cause. Bailey *v.* Mosher, *et al.*, 95 Fed., 223. On appeal, the question was presented to the Circuit Court of Appeals, the judgment of the Circuit Court was reversed and the causes remanded to the state court, for the reason that they involved no federal question. Jones *v.* Mosher, *et al.*, 107 Fed., 561.

The subsequent pleadings are somewhat voluminous, and it will suffice to say that the questions hereinafter discussed are sufficiently presented. The defendant Stuart made default and judgment was taken against him. The defendants Hamer and Phillips died after the action was commenced; as to the former the action was revived against his estate; as to the latter no proceedings for revivor were had.

The cases were all tried at the same time and submitted on the same evidence. At the close of the evidence the court directed a verdict in each case in favor of the defendant Walsh. As to the other defendants, in the several cases, to which they were respectively parties, the jury found for the plaintiff and judgment was given accordingly, from which the defendants respectively prosecute
205 error to this court. One of the principal contentions of the defendant- reduced to its simplest form, is as follows: (1) Damages resulting to a national bank, from the misfeasance or mismanagement of its officers are assets of the bank, and are recoverable of such officers, only in an action brought by the bank, or for the benefit of all of the stockholders and creditors. (2) The damages alleged in the petition resulted to a national bank from the misfeasance and mismanagement of its officers. (3) Therefore, such damages are assets of the bank, and are recoverable only in an action brought

by the bank, or for the benefit of all the stockholders and creditors.

The major premise is so nearly a self evident proposition that it requires no elaboration. It is recognized in Bailey *v.* Mosher, *supra,* and in the cases there cited. But we are not disposed to accept the minor premise. It is true, the petitions show misfeasance and mismanagement on the part of the defendants, as officers of the bank, and, that the bank thereby sustained damages, but they show more than that. They show that the defendants made and published false and misleading statements concerning the financial condition of the bank, whereby the plaintiffs were induced to become and remain its creditors to their damage. In short, whatever other allegation may be contained in the petition-, they also contain sufficient to constitute a common law action for deceit. That the party, upon whom the deceit or imposition was practiced by the officers of a national bank, may maintain an action against them in his own name and behalf for damages resulting to him therefrom, and that his right of action does not rest on the federal statutes but the common law, is no longer an open question. Stewart *v.* Bank, 57 Nebr., 576; Gerner *v.* Mosher, 58 Nebr., 135; 61 *id.,* 100; Prescott *v.* Haoghey, 65 Fed., 653; Gerner *v.* Thompson, 74 Fed., 125;
206 King *v.* Pomeroy, 121 Fed., 287; Briggs *v.* Spaulding, 141 U. S. 132.

But, it is contended, that the petitions are substantially the same as that in Bailey *v.* Mosher, *supra,* and that the Circuit Court of Appeals held that such petition committed the plaintiff to the theory that his action was for misfeasance and mismanagement, resulting in damages to the bank, recoverable only in an action by the receiver for the benefit of all the stockholders and creditors. The difference between the petition in that case and those in the cases at bar has already been pointed out, and the importance which the Circuit Court of Appeals attached to some of the allegations of the petition in that case, which are omitted from those now before us, is shown by the following taken from the body of the opinion:

"We feel constrained to hold that, properly construed, the petition contains but one paragraph or count, and states but one cause of action, and that the cause of action stated is one for the misfeasance and mismanagement of the affairs of the bank by the defendants *and* its officers and directors. We can not adopt the view of the plaintiff in error,—that those clauses of the petition which state, or tend to state, a cause of action for deceit at common law, should be segregated from the other clauses of the petition, and held to constitute the statement of the cause of action. The court can not reject the allegations of the petition which do state a cause of action under the banking act, for the purpose of converting mere matter of inducement or surplusage, contained elsewhere in the petition, into a substantive statement of a cause of action different from that which the petition in terms declares to be the foundation of the action. The plaintiff was not bound to state the legal effect of the facts set out in his petition, but, having done so, he can not complain if his adversary and the court accept and act

upon his own theory. Especially is this so when the petition
207 is ambiguous, and will support that theory as well or better than any other.

"In the sense of the word, as used in code pleading, there is but one paragraph in this petition. The term 'paragraph' as used in code pleading, means an entire or integral statement of a cause of action. It is the equivalent of 'count' at common law. It may embrace one sentence or many sentences; but, whether one or many, it constitutes a statement of a single cause of action. It is a requirement of some codes that, if the petition contains 'more than one cause of action, each shall be distinctly stated in a separate paragraph and numbered,' (Code Arkansas, 5027) and all of them require that each cause of action shall be separately stated, and numbered. The Nebraska Code provides that 'where the petition contains more than one cause of action, each shall be separately stated and numbered.' Consol. St. Neb., 1891, 4633 (93). And the Supreme Court of that state, construing this section, have said: 'A plaintiff can not jumble his causes of action together.' Bank *v.* Bollong, 24 Nebr., 821, 40 N. W., 411. If, in drafting the petition, the pleader supposed he was stating more than one cause of action, he would undoubtedly have separately stated and numbered them, as required by the Nebraska Code. No one can point out in this petition where the statement of one cause of action ends and another begins. The plaintiff can not amend or reform his petition in this court. If it were possible to spell out of the averments of this petition, taken separately or together, an action for deceit, the court would be precluded from attaching that meaning to them by the positive statement contained in the petition itself that the action is grounded on the 'violations of the banking law' therein set out. Section 5239 of the Revised Statutes of the United States provided that:

'If the directors of any national banking association shall
208 knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall thereby be forfeited. * * * And in cases of such violation, every director who participated in, or assented to, the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.'

It is obvious that the plaintiff, in the inception of this case, had in view the enforcement of the defendants' liability under the last clause of this section."

From the foregoing it is clear that the court proceeded upon the ground that the plaintiff, by those allegations of his petition, which are omitted from those in the cases at bar, had committed himself to the theory that his cause of action was one arising under the federal banking law for misfeasance and mismanagement, resulting in damages to the bank. Those very allegations, it held, precluded it from "spelling out" a cause of action for deceit. If those allegations are to be held of so much importance when included in a petition,

it seems to us that their omission, and the studied omission of direct reference to the federal banking law, from the petitions in the cases at bar are equally significant. Besides, it was expressly held, in Jones *v.* Mosher, *et al.*, 107 Fed., 561, that the petition involved no federal question; consequently, it presented no case arising under the federal banking law. It, and the other petitions before us, do state a cause of action for deceit. We know of no rule of pleading that would justify this court in assuming that the plaintiff intended to plead a cause of action which he could not maintain, so long as he has pleaded facts sufficient to constitute one which he
209 could maintain. It may be said in passing that in this state, no such meaning is attached to the term "paragraph," as that given by the Court of Appeals in that case.

It is further insisted, that the judgment rendered in that case supports the plea of *res judicata*, interposed against the plaintiff Bailey in his present action. It is elementary that a cause of action, once finally determined between the parties on the merits, can not afterward, and so long as such judgment remains in force, be litigated by new proceedings, either before the same or any other tribunal. And this rule is not limited to judgments which are the result of a trial of an issue of fact, but applies as well to judgments on demurrer, where such judgments go to the merits of the case. Gould *v.* Evansville, etc. R. Co., 91 U. S., 526; Bissell *v.* Spring Valley Township, 124 U. S., 225; Angles *v.* Mellus, 59 Cal., 444; Gregory *v.* Woodworth, 107 Iowa, 151; Roadman *v.* Michigan Cent. R. Co., 59 Mich., 397. But a judgment on a demurrer which is based on a technical defect of pleading, a lack of jurisdiction, misjoinder of parties, or the like, does not involve the merits of the controversy and is not available as *res judicata*. House *v.* Mullen, 22 Wall., 42; Sivers *v.* Sivers, 97 Cal., 518; Roberts *v.* Hamilton, 56 Iowa, 683. When a plea of *res judicata* is interposed, the controlling question is, whether the judgment offered to support it is based on the merits of the controversy. If it is, it is conclusive and forecloses further investigation. Applying that test to the present case, we do not think the judgment of the court of Appeals, in Bailey *v.* Mosher, *supra*, supports the plea of *res judicata*. It does not dispose of the action for deceit on its merits, but on the technical ground that, by the averment of mere conclusions of law, the plaintiff had committed himself to the theory that the
210 action was of a different character, and precluded an examination of the merits of his action for deceit.

As to the other plaintiffs, it is insisted, that they are concluded by the judgments of dismissal, rendered in the respective cases by the federal court. It will be remembered, that in all of those cases, save that brought by Bailey, the dismissal was on the motion of the plaintiffs, and before the trial of any issue of law or fact. A dismissal, under such circumstances, does not operate as an estoppel, and is no bar to another action. Sec. 430, Code Civil Procedure, seems to embody the prevailing doctrine in regard to a voluntary dismissal, and provides, among other things, that an action may be dismissed by the plaintiff, before a final submission of the cause to

the jury, without prejudice to a future action. See Beals *v.* Western T. U. Co., 53 Nebr., 601; Bank *v.* State, 56 Ld., 188; Harrison *v.* Insurance Co., 80 N. W. (Ia.), 309. That the costs had not been paid in the cases voluntarily dismissed, does not estop the plaintiffs to prosecute these actions. So far as our practice is concerned, the most that can be said of the common law rule, making the payment of the costs in the former action a prerequisite to the prosecution of another, is, that it is one which the trial court, in the exercise of a sound discretion, may or may not apply. U. P. R. R. Co. *v.* Mertes, 35 Nebr., 204. The record shows no abuse of discretion in this instance.

It is next contended by the defendants that these causes were brought and prosecuted on the theory that they were actions for misfeasance and mismanagement. The record does not sustain that contention. It is true there is a large amount of evidence in the record tending to establish misfeasance and mismanagement of the affairs of the bank by the defendants. But this evidence was not introduced for the purpose of proving such facts, but was, in most instances, inseparably connected with evidence tending
211 to establish an action for deceit. That the court tried the cases as actions for deceit, is clearly shown, we think, by an instruction following the statement of the issues, in which the jury were instructed, that the burden of proof was on the plaintiffs to establish the allegations contained in their several petitions closing with these words: "In other words, the burden is upon the plaintiffs severally to show, that the defendants severally published, or caused to be published, or participated in the publication of the statements of the condition of the Capital National Bank * * * that the plaintiffs, each for himself, relied upon the truth of said statements; * * * that such statements were untrue * * *."

It is earnestly contended by the defendants, that the verdicts are not sustained by sufficient evidence. The evidence makes up three large volumes, and it is impossible to discuss it, save in the most general way, without extending this opinion to undue length.

It was incumbent on the plaintiffs to establish by a preponderance of the evidence, (1) That the defendants published the statements purporting to show the financial condition of the Capital National Bank or participated in the publication thereof; (2) That such statements were false; (3) That the plaintiffs severally relied upon such statements and believed them to be true, and were thereby misled to their injury. As to the first proposition, the evidence shows that none of the statements were actually made by all of the defendants, but that each defendant participated in making some of them. It is urged on behalf of the defendant Thompson that he participated *on* making but one of them. That is a mistake; the evidence is conclusive that he signed and participated in making at least four of them, the first being that made and published December 28, 1886, the last that made and published July 9,
212 1891. The mistake arises, perhaps, from the construction which the defendants seem to place on the petitions. The petitions set out two of the statements at length, but it is also alleged

that at divers other times and dates, between the 28th day of December, 1886, and the 21st day of January, 1893, the defendants made and published other false and misleading reports purporting to show the condition of the bank which were relied upon by the plaintiff. The defendants appear to take the position, that the plaintiffs should be restricted to the two reports set out at length. We do not think so. The allegations of the petitions are sufficiently broad to admit proof of any and all statements made on and between the dates just mentioned. If definiteness and certainty required all such statements to be set out at length, the remedy was by motion.

As to the proposition that the statements were false, the evidence involves a maze of figures and computations covering a large portion of the bill of exceptions. The defendants contend, among other things, that the only discrepancies shown by the evidence are discrepancies between the balance book of the bank and the statements, and that such discrepancies are due to the fact that the comptroller of the currency, in pursuance of his authority under the federal banking law, required a different classification of the items in such statements, than that under which they were classified on the books of the bank; that the relation between the totals was not thereby disturbed, consequently, such discrepancies are immaterial. The contention is not borne out by the record. The evidence not only tends to show discrepancies between the statements and the books of the bank, but also between such statements and the actual condition of the bank when the statements were respectively made, and that such discrepancies materially disturbed the relation be-
213 tween the totals of the assets and liabilities of the bank, and made its condition appear better than what it actually was. In short, there is ample evidence to sustain a finding that the bank was insolvent before and during the period covered by the transactions of the plaintiffs with it; that had the statements been made in accordance with the facts they would have shown, notwithstanding the classification required by the comptroller of the currency the true condition of the bank, or at least sufficient to put prospective customers upon inquiry; but instead, they exaggerated the assets, depreciated the liabilities, and were so framed as to conceal the actual condition of the bank and convey the impression that it was not only solvent but prosperous. In the face of these facts, no manipulation of figures or refinement of argument can make it appear that the discrepancies are immaterial, or, that there is a lack of proof that the statements were false. We do not wish to be understood to say that all of the defendants knew that such statements were false; we are satisfied that such is not the case. But, as was said in Gerner *v.* Mosher, 58 Nebr., 135, it was their duty to know whether the statements made by them were true, and the fact that they made and published them without knowledge of their falsity is no defense.

As to the proposition that the plaintiffs relied upon such statements and believed them to be true, and were thereby misled to their injury, we consider it sufficiently established by the

evidence. The plaintiff Bailey testified, that he had had some money to invest and read the published statements of the different banks, including those of the Capital National, in order to keep himself informed of their condition. The following is a portion of his testimony on this point:

Q. How did you come to go to the Capital National Bank?

A. I went on purpose to see what they would pay on the
214 money. And I thought it was just as good as the First National.

Q. What information did you have as to the condition of the Capital National Bank?

A. As soon as I went in they handed me a card and the Directors and stockholders of the Bank were on that card. And I took the papers several years previous.

Q. What papers?

A. The Semi-Weekly Journal I believe and the Call.

Q. What did you see?

A. I saw the bank was in good circumstances, as I supposed, the way the amount of assets read in the published statements.

Q. Well, what did you read in those papers—published statements?

A. Yes—in the published statements in the paper.

Q. Of what bank?

A. The Capital National Bank of Lincoln, Nebr.

Q. State when it was, with reference to time——

A. I suppose ever since the bank started, for I read the papers every day and took particular notice. I had some money to loan out and I took a little notice where I thought was the best place to put it.

Q. And what reliance did you make, if any, upon these statements?

A. Well, that was all the reliance I had was what I could get information in the papers in regard to the standing of the bank.

Q. State what information, if any, you had other than what was disclosed in the statements that were published.

A. That was all the information I had.

Q. You may state where you got your information as to the condition of this bank.

A. I got it from the published statements.

Q. And from any other source?

215 A. No sir, I had no other source to get it from.

Q. State what effect those published statements had upon your transacting business at the Capital National Bank, if any?

A. Why that is all the effect I had to go by was the published statement, supposing it was to be true and correct.

Q. Did you believe it to be true?

A. I believed it to be true or I wouldn't have put my money there, I would have kept it where it was.

Q. Now you may state if you knew at any time, or had any means of knowing that the Capital National Bank * * * was not financially in the condition as represented by its statements.

A. I had no means of knowing.
Q. Well, did you have any knowledge?
A. I had no knowledge.
Q. State what belief, if any, you put in those statements prior to the time you deposited your money in the bank.
A. I believed the statements to be true, or I never would have put my money in the bank, that is sure.

Cross-examination:

Q. And there was no bank in Lincoln, or in the state that you knew of, that stood higher in the general estimation than it?
A. Not in my own mind according to their statement. I don't think there was any in Lincoln any way.

His evidence, fairly construed, sufficiently shows that he relied upon the false statements, believed them to be true, and, consequently, that the bank was safe; that acting in that belief, and influenced by it, he transferred his business to such bank. It is true, his evidence shows that he was influenced somewhat by the higher rate of interest this bank was paying. But it is well settled, that where false statement is relied upon, and is a material inducement,
it is immaterial what other causes contributed to influence the
216 conduct of the injured party. Runge *v.* Brown, 23 Nebr.,
817; Foley *v.* Holtry, 43 *Id.*, 133; Alcott *v.* Bolton, 50 *Id.*, 179; Sioux City National Bank *v.* Norfolk State Bank, 56 Fed., 139. The evidence adduced on behalf of the other plaintiffs on this point is stronger than that adduced by Bailey, and is sufficient, we think, in each case to sustain a finding that the plaintiffs relied upon the statements, believed them to be true and were misled thereby to their injury.

We have gone over the evidence in this case with some care, fully alive to the liability of the jurors to draw wrong inferences, in cases of this character, owing to the lack of time and facilities to consider and weigh the mass of evidence introduced, and are thoroughly satisfied that every fact, essential to a recovery in these cases, is sufficiently sustained by the evidence. We have also gone over the several errors assigned, and have examined them in the light of exhaustive briefs and luminous oral arguments of the learned gentlemen representing the respective parties, but have found no reversible error.

It is therefore recommended that the several judgments be affirmed.

By the COURT: For the reasons stated in the foregoing opinion, the said judgments and each of them are affirmed.

217 And afterward, to-wit, on the 24th day of November, 1905, there was filed in the office of the Clerk of said Supreme Court a certain Motion for Rehearing in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

No. 13032.

CHARLES E. YATES and LOUISA HAMER, Administratrix of the Estate of E. P. Hamer, Deceased, Plaintiffs in Error,

v.

THOMAS BAILEY, Defendant in Error.

Motion for Rehearing.

Now come the plaintiffs in error and each for himself moves the Court to grant a re-hearing in the above entitled cause for the following reasons:

1. The Court has erred in holding that the petitions on which the cases were tried in the District Court of Seward county stated a cause of action for deceit and fraud only, and not for the enforcement of any duties or liabilities of the directors, as officers of a national bank under the National Banking Act, and in construing said petitions as stating a different cause of action from that of the petitions filed in Lancaster county against the same defendants for the same cause of action, which are conceded and decided to be for the enforcement of duties and liabilities of the defendants under the National Banking Act.

2. The Court has erred in holding that it is bound by the construction placed upon the petitions by counsel for the plain-
218 tiff in the actions commenced in Lancaster county, in pleading the legal conclusion that these actions were for the enforcement of liability for violations of the duties and obligations of the Federal Banking Act, and that the omission of these legal conclusions in the petitions filed in Seward county upon the same causes of action justified the Court in holding that the rights, obligations and liabilities in the cases at bar are not determined by the Federal Banking Act, because the Court should have exercised its independent judgment in construing the petitions without regard to the construction of the pleader.

3. The Court has erred in holding that the petitions filed in the Seward County Actions stated a cause of action for fraud and deceit and different from those filed for the same cause of action in Lancaster County, because of the allegations of legal conclusions that the former were actions to enforce liability for violations of the Federal Banking Act which were omitted from the latter.

4. The Court erred in determining the character of liability in these cases by looking to the petitions alone when the acts complained of and the character of liability should be determined by the issues joined between the parties and the evidence adduced pertaining to the law by which and under which the acts and things complained of were done.

5. The Court erred in holding that the plaintiff could maintain his cause of action and recover damages in his own name as an individual depositor in the Capital National Bank.

6. The Court has erred in holding that the judgment
219 rendered on the merits in favor of the defendants in the case decided in the Federal Court, which was removed from Lancaster County is not an adjudication between the same parties which amounts to a bar to the prosecution of this action.

7. The Court has erred in refusing to give full faith, credit and effect to the judgment of the Federal Court in favor of the defendants in the action removed from Lancaster County which was between the same parties and for the same cause of action, in violation of the provisions of the constitution and laws af the United States. Revised Statutes, U. S., Sec. 905. Constitution of the United States, Sec. 1, Article 4.

9. The Court has erred in holding that a common law action of deceit could be maintained against the officers and directors of the Capital National Bank on account of the manner in which they managed and conducted the business of said bank, and in making and publishing reports to the Comptroller concerning the condition of said bank, in performance of their duties under the National Banking Act which determined and provided the duties a-d liabilities of the defendants in their actions thereunder.

9. The Court has erred in holding that it was not necessary in establishing liability against the directors to show that the directors knew the falsity of reports to the Comptroller of the Currency, which they attested as required by the National Banking Act, because that Act provides for liability only in cases where they knowingly violate or knowingly permit the violation of the provisions of that Act.

10. The Court has erred in holding that the United States Court of Appeals in the case of Jones *v.* Mosher, 107 Fed. Rep., 561, decided that the plaintiff's petition did not involve any Federal
220–225 question, and that the petitions did state a cause of action when that Court did not decide the character of the case made by the petitions but only that it had no jurisdiction because the removal was made too late.

11. The Court has erred in holding and deciding that the defense reduced to its simplest form is that damages which result to a national bank from misfeasance and mismanagement of its officers are an asset of the bank recoverable from such officers only in an action by the bank for the benefit of all the stockholders, whereas, the defense actually made is that the only liability of the officers for acts done in the conduct of the business of the bank under the National Banking Act is that provided by the Banking Act and must be enforced against such officers for the benefit of all the creditors and stockholders for ratable distribution under that act.

12. The Court has erred in holding that the plaintiff is entitled to recover under the petitions filed for the reason that they state no sufficient cause of action for fraud, misrepresentation and deceit.

FRANK E. BISHOP,
J. W. DEWEESE,
Att'ys for Pl'ffs in Error.

Endorsed: 13032. Yates *v.* Bailey. Motion for rehearing. Supreme Court of Nebraska Filed Nov 24 1905 H. C. Lindsay, Clerk. Oct. 19/05 Opinion by Albert, C. Overruled 2-20-06.

* * * * * * *

226 And afterward, to-wit, on the 22nd day of February, 1906, there was rendered by said Supreme Court and entered of
227 record upon the Journal thereof a certain Judgment in the words and figures following, to-wit:

No. 13032.

CHARLES E. YATES ET AL., Plaintiffs in Error,
v.
THOMAS BAILEY, Defendant in Error.

Error to the District Court of Seward County.

This cause coming on to be heard upon the motion of Defendant in Error for a rehearing on the motion to quash Bill of Exceptions, was submitted to the Court; upon full consideration whereof, it is by the Court ordered that said motion be, and the same hereby is overruled.

This cause further coming on to be heard upon the motion of Plaintiffs in Error for a rehearing herein, was submitted to the Court; upon full consideration whereof, the court doth find no error apparent in the judgment theretofore entered herein by this Court; and it is therefore considered, ordered, and adjudged that said motion be, and the same hereby is overruled and a rehearing herein refused and denied.

Upon request of Plaintiffs in Error, it is by the Court ordered that mandate in the above entitled cause be, and the same hereby is withheld until the further order of the Court.

228 And on the 22nd day of February there was filed in the office of the Clerk of said Supreme Court a certain Petition for Writ of Error, which said original Petition for Writ of Error is hereto attached, and is in the words and figures following, to-wit:

229 In the Supreme Court of the State of Nebraska.

CHARLES E. YATES, LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased; CHARLES W. MOSHER and RICHARD C. OUTCALT, Plaintiffs in Error,
vs.
THOMAS BAILEY, Defendant in Error.

To the Honorable Chief Justice of the Supreme Court of the State of Nebraska:

The above named plaintiffs in error each complain that in the judgment, decision, record and proceedings in a certain cause pend-

ing in the Supreme Court of the State of Nebraska in which the above named plaintiffs in error were the plaintiffs in error and Thomas Bailey was defendant in error which cause was decided and determined by the Supreme Court of the State of Nebraska and judgment of affirmance rendered therein on October 19, 1905, and in which a motion for a re-hearing in said court was overruled on February 21st, 1906, at which time the judgment of said court became final, which Supreme Court of the State of Nebraska was the highest court in which decision or judgment could be had in said action, in which action and the judgment and the decision thereon there was necessarily involved and decided by said court that the provisions of the National Banking Act of the United States did not control, limit and determine the obligations and liability of the plaintiffs in error as officers and directors of the Capital National Bank of Lincoln Nebraska upon their conduct of the business of said bank, and the performance of their duties under said National Banking Act and upon the reports made by the officers and attested by the directors of said bank to the Comptroller of the Currency,
230 and that said officers and directors of said bank were liable for an action of deceit on said reports notwithstanding the provisions of the National Banking Act, and, by said judgment and decision, refused to give full faith and credit to the judgment of the United States Circuit Court for the District of Nebraska, all in violation of the provisions of the National Banking Act and of Section 1, Article 4 of the Constitution of the United States, and of revised statutes of the United States Section 905, manifest error hath happened as appears from said judgment, decision and record and in the assignment of error herewith presented, to the great damage of the plaintiffs in error.

Wherefore, The said plaintiffs in error pray the allowance of a writ of error to the Supreme Court of the State of Nebraska for the removal of said record, judgment and proceedings in said action into the Supreme Court of the United States for its revision and correction thereof and for citation and supersedeas thereon, and your petitioners will ever pray.

CHARLES E, YATES,
LOUISA *P.* HAMER, *Adm'x,*
By J. W. DEWEESE &
FRANK E. BISHOP,
Their Attorneys.
RICHARD C. OUTCALT AND
CHARLES W. MOSHER,
By CHAS. O. WHEDON,
Their Attorney.

Writ of error allowed and ordered to issue.
February 21 1906.

SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court of Nebraska.

[Endorsed:] 13032. Yates *v.* Bailey. Petition for writ of Error. Supreme Court of Nebraska. Filed Feb. 22, 1906. H. C. Lindsay, Clerk.

231 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Brief of Assignment of Errors, in words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

CHARLES E. YATES, LOUISA HAMER, Administratrix of the Estate of Elis P. Hamer, Deceased; CHARLES W. MOSHER and RICHARD C. OUTCALT, Plaintiffs in Error,

v.

THOMAS BAILEY, Defendant in Error.

Now come the said several plaintiffs in error, Charles E. Yates, Charles W. Mosher and Richard C. Outcalt and Louisa Hamer, administratrix of the estate of Elis P. Hamer, deceased, and each separately and severally respectfully submit that in the record, proceedings, decisions and final judgment of the Supreme Court of the State of Nebraska, in the above entitled cause there is manifest error, in this, to-wit:

Assignments of Error.

1. The Supreme Court of the State of Nebraska has erred in affirming the judgment against the several plaintiffs in error as rendered in the District Court within and for Seward county, Nebraska, in favor of the defendant in error.

2. The Court has erred in deciding that the petition on which said cause was tried and decided states facts sufficient to constitute a cause of action in favor of the defendant in error and against the several plaintiffs in error, or either of them.

232 3. The Court has erred in deciding that the petition filed by the defendant in error as its cause of action sets forth a common law action for deceit and fraud based upon the reports made and attested by the plaintiffs in error to the Comptroller of the Currency as required by the National Banking Act.

4. The Court has erred in holding and deciding that the cause of action alleged by defendant in error, and on which judgment was rendered, is not governed and limited by the liability imposed upon the plaintiffs in error by the National Banking Act. (Title 62 U. S. Rev. Sts. of U. S.)

5. The Court has erred in deciding that the common law action for deceit can be enforced against the plaintiffs in error based wholly upon the reports made by the President and Cashier of the Capital National Bank and attested by the directors of the said bank independent and exclusive of the liability imposed by the provisions of the National Banking Act under which they were acting in making, attesting and publishing such reports to the Comptroller of the Currency.

6. The Court has erred in deciding that Section 5239 of the Revised Statutes of the United States, being a part of the National

Banking Act, does not control, nor limit, or determine the liability of the plaintiffs in error in making, attesting and publishing the reports to the Comptroller of the Currency, showing the condition of the bank.

7. The Court has erred in deciding that the fact that those plaintiffs in error who were directors were without knowledge of any falsity of the reports attested by them or some of them, mentioned in the petition, was immaterial, and that such directors or any of them were liable under the proofs showing they were without knowledge of the falsity of such reports; the said decision is in violation of the provisions of Section 5239 of the Revised Statutes of
233 the United States which makes liability of the directors dependent upon the fact that they knowingly violated or knowingly permitted the violation of the provisions of the National Banking Act, and participated in or assented to such violation.

8. The Court has erred in deciding that a common law action of deceit based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by the directors of such bank can be maintained against such directors, without knowledge of any false statements in such reports, and without any participation in or assent to any violation of the National Banking Act as essential elements of the cause of action as required by Section 5239 of the Revised Statutes of the United States.

9. The Court has erred in deciding that, "The officers of a National Bank are personally liable for false reports made and published by them, in pursuance of Section 5211, Rev. St., U. S., to the party injured thereby and the right of the injured party to maintain the action does not rest on the federal statute, but the common law."

10. The Court has erred in deciding that the defendant in error could maintain his cause of action and recover damages against each of the plaintiffs in error in his name and right as an individual depositor in the Capital National Bank, whereas the only recovery that could be had for false reports or violation of the National Banking Act could be by the bank itself, or its receiver or representative, such recovery to be for the benefit of all the creditors and to be ratably distributed among them as required by Sections 5234 and 5236 of the National Banking Act.

234 11. The Court has erred in deciding the character of liability of the plaintiffs in error by looking to the petition alone, when the acts complained of, and the character of liability, should be determined by the issues joined between the parties, and the rights set up and claimed by the plaintiffs in error in their answers, and the evidence adduced pertaining to the National Banking law by which and under which the acts and things complained of were done, in violation of Section 709 of the Revised Statutes of the United States.

12. The Court has erred in deciding that it is bound by the construction placed upon the petition by counsel for the plaintiff in the same cause of action commenced in Lancaster county, by pleading the legal conclusion that the action was for the enforcement of

liability for violation of the duties and obligations imposed by the National Banking Act, and that the omission of such legal conclusion in the petition filed in this case, upon the same cause of action, justified the Court in deciding that the rights, obligations and liabilities in the case at bar are not determined by the National Banking Act, for the reason that the Court should have construed the petition without regard to the construction of the pleader, or his legal conclusions.

13. The Court has erred in deciding that the cause of action alleged by the defendant in error constituted a common law action for deceit, whereas the ground of complaint as shown in the petition, and the recovery and judgment, are based upon the official misfeasance of the directors of the Capital National Bank, and their mismanagement of the same, in violation of their duties imposed upon them as officers and directors, by the National Banking Act.

235 14. The Court has erred in affirming the judgment, thereby approving instruction number 9th, given to the jury, which permitted the plaintiff to recover on a report of the condition of the bank, attested by the directors, even though such directors did not know that the report was in fact false or untrue. Said instruction 9th, being as follows:

"9th. Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages sustained by one depositing money in such bank in reliance upon the false representation of the condition of the Bank contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue."

15. The Court has erred in approving the refusal of the District Court of Seward County, Nebraska, to give instruction number 6 requested by plaintiffs in error. Which instruction is as follows:

"6. The jury are instructed that if you find from the evidence introduced in reference to any one of the directors named in any one of the said cases that such director did not knowingly violate any of the requirements of the National Banking Act, under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant."

16. The Court has erred in deciding that the judgment of dismissal entered by the Circuit Court of the United States for the District of Nebraska, on February 9, 1894, in an action then and there pending in which the defendant in error herein was plaintiff,

236 and the plaintiffs in error herein were defendants, which judgment was affirmed by the Circuit Court of Appeals, reported in 65 Federal Reporter 488, which judgment was entered upon the same cause of action and for the same right to recover as is asserted in this case, is not a bar to this action, and an adjudication of the rights between the parties to the judgment herein; and in refusing

to give full faith and credit to said judgment of the Circuit Court of the United States for the District of Nebraska, in violation of the provision of the constitution of the United States, Article 4, Section 1.

Wherefore, said plaintiffs in error each severally pray that the judgment of the said Supreme Court of said State of Nebraska be reversed, and judgment be rendered herein in favor of said plaintiffs, and for costs.

J. W. DEWEESE,
FRANK E. BISHOP,
For Defendants Yates and Hamer.
CHAS. O. WHEDON,
Attorney for Richard C. Outcalt and Charles W. Mosher.

Endorsed: 13032. Yates *v.* Bailey. Assignments of Error. Supreme Court of Nebraska. Filed Feb. 22 1906 H. C. Lindsay, Clerk.

And on the following day, to-wit, the 23rd day of February, 1906, there was filed in the office of the Clerk of said Supreme Court a certain Writ of Error and Allowance thereof, which said original Writ of Error and Allowance is hereto attached, and is in the words and figures following, to-wit:

237 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Justices of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Nebraska before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said action between Charles E. Yates, Louisa Hamer, Administrator of Elis P. Hamer deceased, Charles W. Mosher and Richard C. Outcalt, plaintiffs in error and Thomas Bailey, defendant in error wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity; or wherein was drawn in question the validity of the statute of or an authority exercised under said statute of Nebraska on the ground of their being repugnant to the Constitution, statutes or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under the United States, and the decision was against the right, title privilege or exemption specially set up or claimed under such clause of the said Constitution treaty or statute or commission, *and* manifest error hath happened to the great damage of the above named plaintiffs in error as by their complaint appears. We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein

given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have the same in said Supreme Court at
238 Washington, within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the United States this 23rd day of February in the year of our Lord One Thousand Nine Hundred and six.

[Seal United States Circuit Court, District of Nebraska.]

GEO. H. THUMMEL,
Clerk Circuit Court of the United States
for the District of Nebraska,
By JOHN NICHOLSON, *Deputy.*

Allowed by
SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court
of the State of Nebraska.

[Endorsed:] 13032. Yates *v.* Bailey. Writ of Error. Supreme Court of Nebraska. Filed Feb. 23, 1906. H. C. Lindsay, Clerk.

239 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bond in words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

CHARLES E. YATES ET AL.
vs.
THOMAS BAILEY.

Cost Bond on Writ of Error.

Know all men by these presents, that we Charles E. Yates as principal and W. S. Yates, as surety, are held and firmly bound unto Thomas Bailey in the sum of Five Hundred ($500.00) Dollars to be paid to Thomas Bailey defendant in error, his successors, representatives and assigns to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 21st day of February, 1906.

Whereas, The above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse a judgment lately rendered in the Supreme Court of the State of Nebraska in the above entitled action,

Now, Therefore, the condition of this obligation is such that if said Charles E. Yates shall prosecute his writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

CHARLES E. YATES,
By W. S. YATES, *Att'y in Fact.*
W. S. YATES, *Surety.*

240 Sealed and delivered in the presence of

H. C. LINDSAY,
As Witness.

Approved as a cost bond by

SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court of the State of Nebraska.

Endorsed: 13032. Yates *v.* Bailey. Bond. Supreme Court of Nebraska. Filed Feb. 23, 1906. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bond in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

LOUISA HAMER, Administratrix of Elis P. Hamer, Deceased, ET AL.
vs
THOMAS BAILEY.

Cost Bond on Writ of Error.

Know all men by these presents, that we Louisa Hamer, administratrix of Elis P. Hamer, deceased, as principal, and A. G. Hamer, as surety, are held and firmly bound unto Thomas Bailey in the sum of Five Hundred ($500) Dollars to be paid to Thomas Bailey, defendant in error, his successors, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 23 day of February, 1906.

Whereas, the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse a judgment lately rendered in the Supreme Court of the State
241 of Nebraska, in the above entitled action,

Now, Therefore, the condition of this obligation is such that if said Louisa Hamer, administratrix of Elis P. Hamer, deceased, shall prosecute her writ of error to effect, and answer all costs if she

fail to make her plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

LOUISA HAMER,
Administratrix.
A. G. HAMER,
As Surety.

Sealed and delivered in presence of
H. C. LINDSAY,
As Witness.

Approved as a cost bond by
SAMUEL H. SEDGWICK,
Chief Justice of Supreme Court
of the State of Nebraska.

Endorsed: 13032. Yates *v.* Bailey. Bond. Supreme Court of Nebraska. Filed Feb. 23, 1906. H. C. Lindsay, Clerk.

And afterward, to-wit, on the 8th day of March, 1906, there was filed in the office of the Clerk of said Supreme Court a certain Citation, which original Citation is hereto attached, and is in the words and figures following, to-wit:

242 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Thomas Bailey, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Nebraska, Wherein Charles E. Yates, Louisa Hamer Admrx., Charles W. Mosher and Richard C. Outcalt, are plaintiff- in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Samuel H. Sedgwick Chief Justice of the Supreme Court of the State of Nebraska, this 23 day of February in the year of our Lord One Thousand Nine Hundred and Six.

SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court
of the State of Nebraska.

Due and proper service of the within citation and the receipt of a copy thereof are hereby accepted, admitted and acknowledged this 8th day of March 1906.

THOMAS BAILEY,
Defendant in Error,
By LIONEL C. BURR,
JOHN J. THOMAS,
RICHARD S. NORVAL,
His Attorneys.

Supreme Court of Nebraska Filed Mar. 8 1906.
H. C. LINDSAY, *Clerk.*

[Endorsed:] 13032. Chas. E. Yates, *et al. v.* Thos. Bailey. Citation. Supreme Court of Nebraska. Mar. 8, 1906. H. C. Lindsay, Clerk.

243 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that the foregoing is a true and correct transcript of the record, opinion of the court, and final judgment in a cause in said Court, wherein Charles E. Yates, Louisa Hamer, Administratrix of the Estate of Ellis P. Hamer, deceased, David E. Thompson, Richard C. Outcalt and Charles W. Mosher were plaintiffs in error, and Thomas Bailey was defendant in error, as fully as the same is of record and on file in my office.

I further certify that the Bill of Exceptions, a part of the record in said case, herewith transmitted, consists of three volumes designated respectively Volume I, which consists of pages 1 to 612, inclusive; Volume II, which consists of pages 613 to 1320, inclusive; and Volume III, which consists of pages 1321 to 1761 inclusive.

I further certify that the annexed petition for a writ of error, writ of error, and citation are the originals which were lodged in my office, and the whole is now returned in obedience to said writ of error.

I further certify that I have duly retained in my office true and correct copies of said petition for a writ of error, writ of error and citation, with the indorsements thereon.

In testimony whereof, I have hereunto set my hand and the Seal of said Court at Lincoln, this 9th day of March, A. D. 1906.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

244 UNITED STATES OF AMERICA, *Supreme Court of Nebraska, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my hand and affix the seal of said Supreme Court, in the City of Lincoln, this 9th day of March, A. D., 1906.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

MARCH 15, 1906.

Received of plaintiffs in error Seventy-three dollars & ninety-five cents (-73.95) in full payment for within transcript.

H. C. LINDSAY,
Clerk Supreme Court.

245 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
THOMAS BAILEY, Defendant in Error.

Notice.

Notice is hereby given to the above named defendant in error and his attorneys of record, that the assignments of error on which the plaintiffs in error will rely for a reversal of the judgment in said case are attached hereto, and in order to present said errors, the plaintiffs in error designate the certain portions of the transcript of the record in said case, and of the bill of exceptions of the evidence as applicable to the errors relied upon, and said designated portions to be printed in order to present the errors complained of as shown in the schedules attached hereto.

J. W. DEWEESE AND
FRANK E. BISHOP,
Attorneys for Plaintiffs in Error.

Received copy of this notice with copy of assignments of error and designated portions of the record to be printed this 27 day of April, 1906.

L. C. BURR,
R. S. NORVAL, AND
J. J. THOMAS,
Attorneys for Defendant in Error.

246 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
THOMAS BAILEY, Defendant in Error.

Assignments of Error Relied Upon for Reversal and as Basis for Printing Record.

5. The court has erred in deciding that the common law action for deceit can be enforced against the plaintiffs in error based wholly upon the reports made by the President and cashier of the Capital National Bank and attested by the directors of the said bank independent and exclusive of the liability imposed by the provisions of the National Banking Act, under which they were acting, in making, attesting and publishing such reports to the Comptroller of the Currency.

6. The court has erred in deciding that section 5239 of the Revised Statutes of the United States, being a part of the National Banking Act, does not control nor limit or determine the liability

of the plaintiffs in error in making, attesting and publishing the reports to the Comptroller of the Currency showing the condition of the bank.

7. The court has erred in deciding that the fact that those plaintiffs in error who were directors, were without knowledge of any falsity to the reports attested by them, or some of them, mentioned in the petition, was immaterial and that such directors or any of them were liable under the proofs showing they were without knowledge of the falsity of such reports. The said decision is in violation of the provisions of Section 5239 of the Revised Statutes of the United States which makes liability of the directors dependent upon the fact that they knowingly violated, or knowingly permitted the violation of the provisions of the National Banking Act, and participated in or assented to such violation.

8. The court erred in deciding that a common law action of deceit based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by the directors of such bank, can be maintained against such directors without
247 knowledge of any false statements in such reports, and without any participation in or assent to any violation of the National Banking Act as essential elements of the cause of action, as required by section 5239 of the Revised Statutes of the United States.

9. The court has erred in deciding that, "the officers of a National Bank are personally liable for false reports made and published by them, in pursuance of section 5211, Revised Statutes of the United States, to the party injured thereby and the right of the injured party to maintain the action does not rest on the Federal Statutes, but the common law."

10. The court has erred in deciding that the defendant in error could maintain his cause of action and recover damages against each of the plaintiffs in error in his own name and right as an individual depositor in the Capital National Bank, whereas the only recovery that could be had for false reports or violation of the National Banking Act could be by the bank itself or its Receiver or representative, such recovery to be for the benefit of all of the creditors and to be ratably distributed among them as required by section- 5234 and 5236 of the Nationa- Banking Act.

11. The court has erred in deciding the character of liability of the plaintiffs in error by looking to the petition alone, when the acts complained of, and the character of liability, should be determined by the issues joined between the parties, and the rights set up and claimed by the plaintiffs in error in their answers, and the evidence adduced pertaining to the National Banking law by which and under which the acts and things complained of were done, in violation of section 709 of the Revised Statutes of the United States.

12. The court has erred in deciding that it is bound by the construction placed upon the petition by counsel for the plaintiff in the same cause of action commenced in Lancaster County, by pleading the legal conclusion that the action was for the enforcement of liability for violation of the duties and obligations imposed by the

National Banking Act, and that the omission of such legal conclusions in the petition filed in these cases, upon the same
248 cause of action, justified the Court in deciding that the rights, obligations and liabilities in the case at bar are not determined by the National Banking Act, for the reason that the court should have construed the petition without regard to the construction of the pleader, or his legal conclusions.

13. The court has erred in deciding that the cause of action alleged by the defendant in error constituted a common law action for deceit, whereas the ground of complaint as shown in the petition and the recovery and judgment, are based upon the official misfeasance of the directors of the Capital National Bank, and their mismanagement of the same, in violation of their duties imposed upon them as officers and directors by the National Banking Act.

14. The court has erred in affirming the judgment, thereby approving instruction number 9th given to the jury, which permitted the plaintiff to recover on a report of the condition of the bank, attested by the directors, even though such directors did not know that the report was in fact false or untrue.

Said instruction 9th being as follows:

"9th. Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages sustained by one depositing money in such bank in reliance upon the false representations of the condition of the bank, contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue."

15. The court has erred in approving the refusal of the District Court of Seward County, Nebraska, to give instruction number 6 requested by plaintiffs in error. Which instruction is as follows:

"6th. The jury are instructed that if you find from the evidence introduced in reference to any one of the directors named in any one of the said cases, that such director did not knowingly violate any of the requirements of the National Banking Act, under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant."

16. The court has erred in deciding that the judgment of dismissal entered by the Circuit Court of the United States for
249 the District of Nebraska on February 9th, 1894, in an action then and there pending in which the defendant in error herein was plaintiff, and the plaintiffs in error herein were defendants, which judgment was affirmed by the Circuit Court of Appeals, reported in 65 Federal Reporter 488, which judgment was entered upon the same cause of action and for the same right to recover as is asserted in this case, is not a bar to this action, and an adjudication of the rights between the parties to the judgment herein; and in refusing to give full faith and credit to said judgment of the Circuit Court of the United States for the District of Nebraska, in

violation of the provisions of the Constitution of the United States, Article 4, Section 1.

J. W. DEWEESE,
F. E. BISHOP,
Att'ys for Pl'ffs in Error.

250 In the Supreme Court of the United States.

CHARLES E. YATES, LOUISA HAMER, Administratrix; C. W. MOSHER, and R. C. OUTCALT, Plaintiffs in Error,
vs.
THOMAS BAILEY, Defendants in Error.

Designation for Printing from the Transcript of the Record in the Above Entitled Case.

The plaintiffs in error in the above entitled case, request the Clerk of the Supreme Court of the United States to print the following designated portions of the transcript of the record applicable to the errors alleged in the above entitled case, number 639, to-wit:

1. Title, venue and petitions in error of Charles E. Yates and Louisa Hamer, administratrix, of the transcript, pages 1 to the words "Be it remembered," in the last paragraph on page 11.

2. Transcript page 15, amended petition, beginning with the words, "And afterwards on the 16th, day of March, 1899," to the end of the demurrer including the signature of attorneys on page 28.

(The answer and all pleadings of Walsh, and the Walsh estate should be omitted, as no judgment was rendered against them.)

3. Transcript page 35, Answer of Charles E. Yates and Louisa Hamer, beginning with the words "And afterwards on the 15th day of July, 1901," to and including the oath on answer of Charles E. Yates page 41.

4. Transcript page 53, reply, beginning with the words, "And afterwards on the 23rd day of August, 1901," to oath of Bailey to reply on page 54.

251 5. Transcript page 58, stipulation, beginning with the words, "And afterwards on the 28th, day of May, 1902," to and including the signatures of attorneys thereto page 60.

6. Transcript page 69, instructions given and refused, beginning with the words, "And afterwards on the 19th, day of June, 1902," to the last signature of the Judge on page 97.

7. Transcript page 116, motion for new trial, beginning with the words, "And afterwards on the 21st day of June, 1902," to the signature of the attorneys near the top of page 125.

8. Transcript page 126, order on motion and judgment, to and including the record of the filing at the top of page 133.

9. Transcript page 135, motions order and stipulation on bill of exceptions, to the end of the order of the Supreme Court at the middle of page 139.

10. Transcript page 197, proceedings, judgment, opinion and motion on re-hearing, to the end of page 220, except the last two lines.

11. Transcript page 226, order on re-hearing and proceedings on writ of error, beginning with the words, "And afterwards, to-wit on the 22nd day of February, 1906," to and including page 244.

J. W. DEWEESE,
F. E. BISHOP,
Att'ys for Pl'ffs in Error.

252 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
THOMAS BAILEY, Defendant in Error.

Designating for Printing from the Bill of Exceptions of the Evidence in the Above Entitled Case.

The plaintiffs in error in the above entitled case request the Clerk of the Supreme Court of the United States to print the designated portions of the bill of exceptions as follows, (The numbers refer to red figures at lower right hand corner of pages), to-wit:

There being no assignments of any errors on account of the offer and rejection of testimony, all objections and exceptions to testimony in the bill of exceptions of the evidence are to be omitted from the printed record.

1. Title, pages 1 and 2.
2. Testimony of A. D. Lynch, pages 8 to 13 inclusive.
3. Correspondence and oaths, page 14 to near the middle of page 21, (Similar oaths were taken by the directors from the beginning of the bank to the time of its failure in 1893).
4. Report of December 9th, 1892 and certificate of publication on reverse side, pages 39 and 40, front and reverse side, omitting objections.
5. Bank Charter, pages 52 and 53, omitting objections.
6. Letters to and from Comptroller, pages 56 except the first line, to 64 inclusive, omitting objections.
7. Publication of reports, page 68 commencing with the words "Notice of publication in the State Journal," to page 69 inclusive, omitting objections.
8. Publication of reports, commencing near the middle of page 76 with the words, "Mr. Norval, I now offer in evidence exhibit No. 980," and page 77 inclusive, omitting objections.
9. Testimony of H. J. Whitmore, page 340.
10. Cross-examination of H. J. Whitmore, page 708 *including* objection.

253 11. Cross-examination of H. Whitmore, page 709 commencing with the last question on said page with these words: "I will ask you to state whether these reports that you have referred to," to the end of the answer to that question on page 710, inclusive.

12. Testimony of E. Jacobs, page 864 to page 896 inclusive, omitting objections.

13. Testimony of E. Jacobs, page 901, beginning with the first question thereon, to page 903, ending with the answer: "I had no other source," omitting objections.

14. Testimony of E. Jacobs page 911 beginning with the question, to the words, "Witness excused" on page 916, omitting objections.

15. Testimony of Thomas Bailey, page 916 to the words "Witness excused," on page 934, omitting objections.

16. Testimony of Fritz Beckard, page 934, beginning with the words, "Mr. Fritz Beckard called as witness," to the words, "Witness excused" on page 949, omitting objections.

17. Testimony of H. T. Jones, page 974, to the words "Yes, sir," near the middle of page 975, omitting objections.

18. Testimony of H. T. Jones, page 977 to the last question on page 981, omitting objections.

19. Testimony of H. T. Jones, page 983 beginning with the first question thereon, to page 984, inclusive.

20. Testimony of C. E. Yates page 1111, commencing with the words "Mr. C. E. Yates called as a witness," to page 1121, ending with the words, "Witness excused," omitting objections.

21. Testimony of D. E. Thompson, page 1132 to the words "Witness excused," page 1188, omitting objections.

22. Former adjudication in the Bailey case, pages 1242 to 1274, inclusive, omitting objections.

254 23. Bank reports, pages 1297, commencing with words: "Mr. Thomas, the plaintiffs offer in evidence exhibit No. 1074," and exhibit number 1074 (7 sheets) attached, omitting objections.

24. Bank reports, pages 1304 and exhibit number 1075 (7 sheets) attached, omitting objections.

J. W. DEWEESE,
F. E. BISHOP,
Att'ys for Pl'ffs in Error.

255 [Endorsed:] File No. 20,141. Supreme Court U. S., October Term, 1905. Term No. 232. Charles E. Yates *et al.*, Plaintiffs in Error, *vs.* Thomas Bailey. Assignment of Errors & designation by P. E. of parts of record to be printed with notice and acceptance of service. Filed May 1, 1906.

256 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
THOMAS BAILEY, Defendant in Error.

Designation for Printing from the Bill of Exceptions of the Evidence in the Above Entitled Cause.

The defendant in error in the above entitled cause having been served with notice on April 27, 1906, by the plaintiffs in error, of certain designations for printing from the bill of exceptions of the

evidence in said cause, does now hereby request the Clerk of the Supreme Court of the United States to print the following designated portions of the bill of exceptions aforesaid in addition to that heretofore designated by the plaintiffs in error as aforesaid.

1. Commencing with the words "Oath of Directors" on page 36, to the words "R. C. Outcalt, Notary Public" at page 37 inclusive.

2. Certificate. Commencing with the words "Treasury Department. Office of" on page 54, take to the words "Deputy & Acting Comptroller of the Currency" on page 55 inclusive.

3. Report of August 1, 1887, including all of page 73.

4. Report of October 5, 1887, including all of page 75.

5. Commencing at top of page 79, to the words "Accts. solicited, Banks, Bankers and Merchants" on same page.

6. Report of December 12, 1888, including all of page 81.

7. Report of September 30, 1889, including all of page 84.

8. Report of December 11, 1889, including all of page 86.

9. Report of December 19, 1890, including all of page 88.

10. Report of July 9, 1891, including all of page 91.

11. Report of September 25, 1891, including all of page 93.

12. Report of December 2, 1891, including all of page 95.

13. Testimony of H. T. Jones, commencing at top of page 102, to the middle of page 108 inclusive, omitting objections and rulings thereon.

257 14. Testimony of G. W. Post, commencing on page 108 with the following words "G. W. Post called as a witness on behalf of the plaintiffs" etc., to the last question on page 112 inclusive, omitting objections and rulings thereon.

15. All testimony of G. W. Post on pages 110, 111 and 112 except the last question, omitting objections and rulings thereon.

16. Testimony of Edward Hurlbert, Jr., commencing on page 114, to and including the first question and answer thereto on page 118, ending with the words "A. I do not," omitting objections and rulings thereon.

17. Redirect examination of Edward Hurlbert, Jr., commencing with page 132 and including page 133 except questions and answers numbered 5, 6 and 7, and including page 134 to the words "that is all," omitting objections and rulings thereon.

18. Testimony of Edward Hurlbert, Jr., on page 145, commencing with the words "By Mr. Thomas" to and including the words "Witness excused."

19. Testimony of A. L. Clark on pages 146 to 148 inclusive to the words "Witness excused," omitting objections and rulings thereon.

20. Testimony of F. S. Johnson on pages 148 to 150 inclusive, omitting objections and rulings thereon.

21. Testimony of Leonidas M. Lawson, commencing at page 159, to and including first answer on page 178 as follows: "A. No such payment was made" omitting objections.

22. Testimony of William Ayres, Jr., commencing at page 182, to and including first question and answer on page 184.

23. Same witness, commencing with the last question on page

201, including all of page 202 and the first two lines on page 206, omitting objections.

24. Same witness, commencing with last question on page 213, to and including the first answer on page 214, omitting objections.

25. First two lines on page 240.

26. Certificate of judgment, Exhibit 991, on page 242.

258 27. Testimony of I. A. Baker on page 243. The 1, 2 and 3 questions and answers, omitting objections.

28. Certificate of judgment. Exhibit 992, on page 245.

29. Last question and answer on page 244, omitting objection.

30. All of page 247, omitting objections.

31. All of Exhibit 993, on page 249.

32. Testimony of I. A. Baker on pages 251 and 252, omitting objections.

33. All of Exhibit 994, on page 253.

34. Testimony on page 255, omitting objections.

35. All of Exhibit 995, on page 257 including last two lines on page 256.

36. Testimony of G. W. Shreck, pages 280 to 284 inclusive, omitting objections and rulings thereon.

37. Testimony of C. W. Hamilton from page 296 to 300 inclusive, omitting objections.

38. By-laws. Section 17 on page 318, and Section 26 on page 319.

39. On page 323 commencing with the words "Page 36—Special Meeting" to and including the first ten lines on page 324 and ending with the words "R. C. Outcalt, Sec'y."

40. Testimony of H. J. Whitmore, commencing with page 340, to and including second answer on page 343 ending with the words "to the Marsh National" omitting objections.

41. Same witness, on page 345 commence with the last question—take to and including first ten lines on page 348, ending with the figures "$15,050.88," omitting objections.

42. Same witness, on page 348, commence with the last question and take to and including the first four lines on page 352, ending with the words "Donnell, Lawson & Simpson."

43. Same witness, on page 354, commence with the first question and take to and including the second answer on page 356, ending with the words "Marsh National Bank" omitting objections.

44. Same witness, on page 357, commence with offer of Exhibit No. 1002 in following words "The entry offered, received and

259 read in evidence being as follows" and take to and including the last answer on page 371, ending with the words "of the Bank on that day," omitting objections.

45. Same witness, on page 372 commence with the second question (11 line from the top) and take to and including the first line on page 375, ending with the words "A. No sir," omitting objections.

46. Same witness, on page 375, commence with the second question on 14 line and take to and including the first line on page 376, ending with the words "A. Yes sir."

47. Same witness, all of page 379, omitting objections.

48. Same witness, on page 380, the second question and answer thereto, omitting objections.

49. Same witness, on page 382, commence with the last answer (5 line from bottom of page) and take to and including the last answer on page 384, ending with the words "A. No, there are none" omitting objections.

50. Same witness, on page 385, commence with the last two lines at bottom of page and take to and including page 392, omitting objections.

51. Same witness, on page 400, commence with the 12 line from the bottom and include that question and the answer following, ending with the words "A. I do."

52. Same witness, on page 401, commence with the 7 line from the bottom with the words "have you made an investigation" etc. and take to and including answer thereto on page 402, ending with the words "Yes sir" omitting objections.

53. Same witness, on page 404, commence with the third question and answer from bottom of page and include balance of page.

54. Same witness, on page 405, commence with third question (14 line from top of page) and take to and including the answer at top of page 406, ending with the words "it does" omitting objections.

55. Same witness, on page 432, commence with eighth line from the bottom (third question) and take to the bottom of page 438 omitting objections.

260 56. Same witness, on page 442, commence with the third question from the top (seventh line) take to and including answer on page 443 ending with the words "2nd of July."

57. Same witness, on page 444, commence with the second question near middle of page with the words "I will ask you" etc. and take to and including sixth answer on page 446, ending with words "I couldn't determine it from the books I have here to my own satisfaction."

58. Same witness, on page 453, commence with the fifth line (second question) from top of page and take to and including page 454, omitting objections.

59. Same witness, on page 457, commence with the two last lines at bottom of page and take to and including first two lines on page 459.

60. Same witness, on page 459, commence at third line from the bottom (last question) and take to bottom of page 460, omitting objections.

61. Same witness, on page 462, commence at top of page and take to the middle of page 464 ending with the words "Q. Does that include the surplus? A. No sir," omitting objections.

62. Same witness, on page 465, commence with thirteenth line from the bottom of the page (second question from bottom) and take to and including first thirteen lines on page 504, omitting objections.

63. Same witness, on page 520, commence at top of page omitting first line and take to and including all of page 527 omitting objections.

64. Same witness, on page 531, commence with second question (sixth line from top of page) and take to and including eleventh line from top of page 532 ending with the words "A. No sir" omitting objections.

65. Same witness, on page 535 commence with second question at top of page (nineth line from top) and take to and including the first line on page 554, omitting objections and omitting also the third question and answer on page 536 being lines from 16 to 19 inclusive.

66. Same witness, on page 561, commencing at top of page, to and including all of page 563, omitting objections.

261 67. Same witness, on page 564, commence at top of page and take to and including all of page 587.

68. Same witness, on page 588, take first four lines (first question and answer).

69. Same witness, on page 599, commence with first question (tenth line from top of page) and take to fifth line from bottom on page 591 ending with the words "shown in the published statement" omitting objections.

70. Same witness, on page 592, commencing with the last question on that page and take to the bottom of page 600 inclusive, omitting objections.

71. Same witness, on page 655, commence with the sixth question (twelfth line from top of page) and take the balance of that page.

72. Same witness, on page 679, commence at top of page and take to bottom of page 693 inclusive, omitting objections.

73. Same witness, all of pages 708, 709, 710, 711 and 712 *including objections and rulings of court thereon.*

74. Same witness, all of page 713 except the last question, ending with the words "is these copies of published statements."

75. Same witness, on page 755, question on that page and answer thereto on page 756 omitting objections.

76. Same witness, all of page 758 except the last question at bottom of page, omitting objections.

77. On page 765 commence with the second question at the middle of page and take to and including the first answer (first four lines) at top of page 769, omitting objections.

78. Same witness, take last question on page 793 and answer thereto on page 794.

79. Same witness, take question on page 812 and answer thereto on page 813, omitting objections.

80. Schedules of certificates of taxes. Commence at top of page 813 and take to middle of page 829 inclusive, to the words "cross examination."

262 81. Testimony of E. Jacobs. Commence at top of page 864 and take to and including page 903, omitting objections.

82. Same witness, commence with question on page 911 and take the remainder of witness'*es* testimony to the words "witness excused" on page 916, omitting objections.

83. All of testimony of Thomas Bailey, pages 916 to 934 inclusive, omitting objections.

84. All of the testimony of Fritz Beckard, pages 934 to 949 inclusive omitting objections.

85. Testimony of Whitmore on pages 950 and 951 except last question on page 951, omitting objections.

86. Same witness, on page 960, commence with the second question (thirteenth line) and take to and including the first answer (first twelve lines) on page 963, omitting objections.

87. Same witness, on page 968, commence with the third question (tenth line) and take to page 970 inclusive ending with the fourth answer on the eleventh line.

88. Testimony of H. T. Jones. Commence at top of page 974 and take to and including first answer (fifth line) on page 1037, ending with the words "honestly kept" omitting objections.

89. Bill of sale and chattel mortgage. Commencing at top of page 1199 and take to and including page 1204.

90. Take first four lines on page 1312.

91. Deposition of John W. McDonald, Receiver. Take all of page 1323.

92. Same witness, on page 1325 take the first and second questions and answers.

93. Same witness, on page 1360, commence with the words "April 8, 1902, 2 O'Clock P. M." Ques. 197, and take to bottom of page 1370 inclusive omitting objections.

94. Same witness, on page 1374, commence with the words "redirect examination" and take to bottom of page 1377 inclusive, omitting objections.

263 95. Deposition of J. E. Hill. Commence at page 1382 and take to and including page 1392 ending with answer to question No. 299 with the words "A. I did not."

96. Same witness, take all of page 1408.

97. Deposition of D. J. Carnes. Commence at top of page 1417 and take to and including answer to interrogatory 28 on page 1423 ending with the words "into a good many thousands of dollars."

98. Same witness, on page 1427, commence with the words "redirect" (fourth line from top) take to and including signature of "Frank Langlas, Jr., Notary Public" on page 1429.

99. Deposition of P. M. Alden on page 1429. Commence with the words "P. M. Alden of lawful age" etc., take to and including answer to interrogatory 34, Page 1432 (ninth line from top).

100. Same witness, on page 1436, commence with the word "redirect" and take to and including the words "Frank Langlas, Jr., Notary Public" near bottom of page 1437.

101. Deposition of John W. McDonald, Receiver. Commence at top of page 1441 and take the first four questions and answers on same page, ending with the words "A. Yes" on fifteenth line.

102. Same witness, on page 1452, commence with the fourth question (sixteenth line from top) with the words "you may produce record book No. 1" etc., and take to and including the third answer on page 1458 ending with the words "A. They were rediscounted."

103. Same witness, on page 1463, commence with the words "May 15, 1902, 9 A. M." and take to and including the third answer on page 1466, ending with the words "A. Yes, I think so" omitting objections.

104. Same witness, take last question on page 1466 and answer thereto on page 1467, ending with words "A. Yes" omitting objections.

105. Same witness, on page 1471, commence with fourth question (thirteenth line from top) and take to and including the first answer on page 1472 ending with the words "A. Yes" omitting objections.

106. Same witness, on page 1473, commence with the third question (fourteenth line) take to and including the first question on page 1474 ending with the words "Q. You may refer to the ledger?" omitting objection.

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107. Same witness, on page 1484, commence with the words "Thomas: I now repeat my original question" etc., and take to and including second answer (eighth line) on top of page 1488, ending with the figures "A. $331,359.86," omitting objections.

108. Same witness, on page 1492, commence with the last question on seventh line from bottom of page and take to and including first question and answer on page 1504 ending with the figures "A. $300,000." omitting objections.

109. Same witness, on page 1504, commence with the last question at bottom of page (sixth line from bottom) and take to and including first question and answer at top of page 1506.

110. Same witness, on page 1508, commence with the fourth question (fourteenth line from top) and take to and including third answer on page 1519 ending with the words "Oh—I think they have very little value."

111. Same witness, on page 1521, commence with the last question (fourth line from bottom of page) and take to and including second answer on page 1524 ending with the words "Yes" on ninth line from top.

112. Same witness, commence at top of page 1540 and take to bottom of page 1541 inclusive, omitting objections.

113. Testimony of R. C. Outcalt. Commence at top of page 1548 and take to cross-examination on page 1606, omitting objections.

114. Testimony of Hale. Commence at top of page 1612 and take to and including answer to fifth question on page 1622 (seventh line from top of page) omitting objections.

115. Same witness, on page 1623, commence with the second question from the bottom and take to bottom of that page.

116. Same witness, on page 1624, take last question on that page and first answer on page 1625.

117. Same witness, take last question on page 1625 and all of page 1626 except the last two lines, ending with the words "A. They could not."

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118. Same witness, on page 1647, commencing with the third question (fourteenth line from top) with the words "Now Mr. Hale" etc. and end with the direct examination near bottom of page with the words "A. They are. Yes sir."

L. C. BURR,
R. S. NORVAL, &
J. J. THOMAS,
Attorneys for Defendant in Error.

Received a copy of the above designations for printing from the bill of exceptions of the evidence in the above entitled cause this 7th day of July, 1906, but we object to printing the designated portions of the record because not necessary to a review of the errors relied upon for reversal, and the costs of printing the same should be taxed to defendant in error.

J. W. DEWEESE,
F. E. BISHOP,
Attorneys for Plaintiffs in Error.

266 [Endorsed:] 232, 20141. In the Supreme Court of the United States. Charles E. Yates, *et al.*, Plaintiffs in error, *vs.* Thomas Bailey, Defendant in error. Designations for printing from the Bill of Exceptions.

267 [Endorsed:] File No. 20,141. Supreme Court U. S. October Term, 1906. Term No. 232. Charles E. Yates *et al.*, Pl'ffs in Error, *vs.* Thomas Bailey. Designation by counsel for the defendant in error of additional parts of bill of exceptions to be printed & proof of service of copy of same. Filed July 13th, 1906.

Endorsed on cover: File No. 20,141. Nebraska supreme court. Term No. 232. Charles E. Yates, Louisa Hamer, adm'x of Elis P. Hamer, deceased, Charles W. Mosher *et al.*, plaintiffs in error, *vs.* Thomas Bailey. Filed March 20th, 1906. File No. 20,141.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 233.

CHARLES E. YATES, DAVID E. THOMPSON, LOUISA HAMER, ADM'X OF ELIS P. HAMER, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

BANK OF STAPLEHURST.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MARCH 20, 1906.

(20,142.)

(20,142.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 233.

CHARLES E. YATES, DAVID E. THOMPSON, LOUISA HAMER, ADM'X OF ELIS P. HAMER, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

BANK OF STAPLEHURST.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 No. 13033.

CHARLES E. YATES, LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased, and David E. Thompson
v.
BANK OF STAPLEHURST.

RICHARD C. OUTCALT
v.
BANK OF STAPLEHURST.

CHAS. W. MOSHER
v.
BANK OF STAPLEHURST.

Pleas: Before the Supreme Court of the State of Nebraska at a term thereof begun and holden at the Capitol in the City of Lincoln, in said State, on the 2nd day of January, A. D., 1906.

Present: Hon. Samuel H. Sedgwick, Chief Justice; Hon. John B. Barnes, Judge; Hon. Charles B. Letton, Judge.
Attest:
H. C. LINDSAY, *Clerk.*

Be it remembered, that on the 28th day of November, A. D., 1902, there was filed in the office of the Clerk of said Supreme Court a certain Petition in Error of Charles E. Yates in the words and figures following, to wit:

2 In the Supreme Court of the State of Nebraska.

CHARLES E. YATES, Plaintiff in Error,
vs.
BANK OF STAPLEHURST, Defendant in Error.

The plaintiff complains of the defendant, for that on the 21st day of July, 1902, the defendant herein recovered a judgment against the plaintiff herein, in the district court of Seward county, Nebraska, for the sum of $13,510.96 and costs amounting to the sum of $—. That subsequently, and on the 22nd day of October, 1902, at the same term of said court, an order was made by said court requiring the said defendant in error to remit a portion of said judgment, as the same was excessive to the extent of $347.42; and that said defendant in error filed a remittitur in obedience to the order of said court; and judgment was then formally entered in favor of the defendant in error and against this plaintiff in error, in the sum of $13,163.54 in said action pending in said court, wherein the defendant herein was plaintiff and the plaintiff herein was defendant.

A transcript of said judgment, pleadings and proceedings in said cause, together with the bill of exceptions containing all of the evidence introduced, is filed herewith.

The plaintiff alleges that there is error in said proceedings and judgment, in this:

1st. The court erred in overruling the objections of this defendant below to the introduction of any testimony, at the time the same was offered on the trial of said cause, as appears by the bill of exceptions in said cause, page 8; said objection being based upon the character of the case as made in the plaintiff's petition, it being strictly and specifically alleged that the defendant below in the several
3 acts of misconduct, negligence, misfeasance and fraud of which the plaintiff complained, acted in his official capacity as a director of the Capital National Bank; and that acting as such director it became and was his duty under the law, as well as the by-laws of said National Bank, as is alleged, to do various and sundry things which he neglected to do, and which he purposely omitted to do; and that in his official capacity, and acting as such director, he did various things, as is specifically alleged, in violation of his duties and obligations as a director of said bank, thereby causing heavy losses to the said bank, under the law and the by-laws of said bank, thereby causing heavy losses to the said bank, which caused its insolvency, and which it is alleged resulted in a damage to the plaintiff below; whereas, if said allegations of misfeasance, nonfeasance and fraud of said defendant below in his capacity as a director of said National Bank were true, any damage caused by the facts alleged would be a direct damage to said bank, and any recovery therefor would be an asset of said bank to be ratably distributed among the creditors and stockholders of said bank; and such damages were recoverable alone by said bank, or the receiver of said bank, and not by the plaintiff below in its individual capacity against the defendant below.

2nd. The court erred in rendering judgment against the defendant below, for the reason that under the issues joined and the evidence introduced, the plaintiff below was not entitled under the law to recover a judgment for itself individually against the defendant below in his individual capacity or otherwise; and for the reason that whatever damage there was, if any, caused by the negligence, misconduct and fraud of the defendant below in his capacity as a director in the Capital National Bank, was recoverable alone by said Bank or the Receiver of said Bank, and not by the plaintiff below.

3rd. The court erred in refusing to give the first paragraph of the instructions requested by this plaintiff in error, defendant below, for the court to direct the jury to return a verdict in favor of the defendant below, being numbered 1, and found in the transcript on page 69.

4 4th. The court erred in giving the eleventh paragraph of the instructions given by the court, numbered 11th, found on page 52 of the transcript.

5th. The court erred in giving to the jury the sixteenth paragraph

of its charge to the jury, numbered 16th, where he undertakes to define the actionable negligence of a director of the bank in not discovering the embezzlement of funds by the president of the bank or of the cashier, thus fixing a liability not recognized by the law fixing and defining the duties of directors of national banks, and in direct violation of the principle and requirements specified in Sections 5239 and other sections of the National Banking Act.

6th. The court erred in giving the seventeenth paragraph of its instructions to the jury, numbered 17th, for the same reasons as set forth in the assignment of errors concerning the giving of the sixteenth paragraph above mentioned.

7th. The court erred in refusing to give the sixth paragraph of the instructions requested by the defendant below, numbered 6th, wherein the duties and liabilities of directors of national banks are defined in accordance with the provisions of the National Banking Act.

8th. The court erred in each one of its instructions to the jury in the construction and application of the duties and liabilities of directors of national banks under the national banking act, as shown by paragraphs of the charge of the court to the jury numbered 9th, 10th, 11th, 16th and 17th.

9th. The court erred in overruling the motion for a new trial.

10th. The court erred in entering judgment against the defendant Charles E. Yates, for the reason that the plaintiff's cause of action, if it ever had any against him, did not accrue to him within five years prior to the commencement of said action; and said action was barred by the statute of limitations as against said defendant.

The plaintiff therefore prays that said judgment may be reversed and said cause of action dismissed, and that said plaintiff in error go hence without costs.

J. W. DEWEESE,
Att'y for Pl'ff in Error.

Endorsed: No. 13033. Charles E. Yates, *et al. vs.* Bank of Staplehurst. Petition in Error of Charles E. Yates. Supreme Court of Nebraska. Filed Nov. 28, 1902. Lee Herdman, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Petition in Error of Louisa Hamer, Administratrix, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Dec'd, Plaintiff in Error,

vs.

BANK OF STAPLEHURST, Defendant in Error.

The plaintiff complains of the defendant, for that on the 21st day of July, 1902, the defendant herein recovered a judgment

against the plaintiff herein, in the district court of Seward county, Nebraska for the sum of $13,510.96 and costs amounting to the sum of $—. That subsequently, and on the 22nd day of October, 1902, at the same term of said court, an order was made by said court requiring the said defendant in error to remit a portion of said judgment, as the same was excessive to the extent of $347.42;
6 and that said defendant in error filed a remittitur in obedience to the order of said court, and judgment was then formally entered in favor of the defendant in error and against this plaintiff error, in the sum of $13,163.54 in said action pending in said court, wherein the defendant herein was plaintiff and the plaintiff herein was defendant.

A transcript of said judgment, pleadings and proceedings in said cause, together with the bill of exceptions containing all of the evidence introduced, is filed herewith.

The plaintiff alleges that there is error in said proceedings and judgment, in this:

1st. The court erred in overruling the objections of this defendant below to the introduction of any testimony, at the time the same was offered on the trial of said cause, as appears by the bill of exceptions in said cause, page 8; said objection being based upon the character of the case as made in the plaintiff's petition, it being strictly and specifically alleged that the defendant below in the several acts of misconduct, negligence, misfeasance and fraud of which the plaintiff complained, acted in his official capacity as a director of the Capital National Bank; and that acting as such director it became and was his duty under the law, as well as the by-laws of said National Bank, as is alleged, to do various and sundry things which he neglected to do, and which he purposely omitted to do; and that in his official capacity, and acting as such director, he did various things, as is specifically alleged, in violation of his duties and obligations as a director of said bank, under the law and the by-laws of said bank, thereby causing heavy losses to the said bank, which caused its insolvency, and which it is alleged resulted in a damage to the plaintiff below; whereas, if said allegations of misfeasance, nonfeasance and fraud of said defendant below in his capacity as a director of said National Bank were true, any damage caused by the facts alleged would be a direct damage to said bank, and any recovery therefor would be an asset of said bank to be ratably distributed among the creditors and
7 stockholders of said bank; and such damages were recoverable alone by said bank, or the receiver of said bank, and not by the plaintiff below in its individual capacity against the defendant below.

2nd. The court erred in rendering judgment against the defendant below, for the reason that under the issues joined and the evidence introduced, the plaintiff below was not entitled under the law to recover a judgment for himself individually against the defendant below in his individual capacity or otherwise; and for the reason that whatever damage there was, if any, caused by the negligence, misconduct and fraud of the defendant below in his

capacity as a director in the Capital National Bank, was recoverable alone by said Bank or the Receiver of said Bank, and not by the plaintiff below.

3rd. The court erred in refusing to give the first paragraph of the instructions requested by this plaintiff in error, defendant below, for the court to direct the jury to return a verdict in favor of the defendant below, being numbered 1, and found in the transcript on page 69.

4th. The court erred in giving the eleventh paragraph of the instructions given by the court, numbered 11th, found on page 52 of the transcript.

5th. The court erred in giving to the jury the sixteenth paragraph of its charge to the jury, numbered 16th, where he undertakes to define the actionable negligence of a director of the bank in not discovering the embezzlement of funds by the president of the bank or of the cashier, thus fixing a liability not recognized by the law fixing and defining the duties of directors of national banks, and in direct violation of the principle and requirements specified in Sections 5239 and other sections of the National Banking Act.

6th. The court erred in giving the seventeenth paragraph of its instructions to the jury, numbered 17th, for the same reasons
8 as set forth in the assignment of errors concerning the giving of the sixteenth paragraph above mentioned.

7th. The court erred in refusing to give the sixth paragraph of the instructions requested by the defendant below, numbered 6th, wherein the duties and liabilities of directors of national banks are defined in accordance with the provisions of the National Banking Act.

8th. The court erred in each one of its instructions to the jury in the construction and application of the duties and liabilities of directors of national banks under the national banking act, as shown by paragraphs of the charge of the court to the jury numbered 9th, 10th, 11th, 16th and 17th.

9th. The court erred in overruling the motion for a new trial.

10th. The court erred in entering judgment against the defendant Louisa Hamer, Administratrix of the Estate of Ellis P. Hamer, deceased, for the reason that the plaintiff's cause of action, if it ever had any against her, did not accrue to him within five years prior to the commencement of said action; and said action was barred by the statute of limitations as against said defendant.

The plaintiff therefore prays that said judgment may be reversed and said cause of action dismissed, and that said plaintiff in error go hence without costs.

J. W. DEWEESE,
Att'y for Pl'ff in Error.

Endorsed: No. 13033. Charles E. Yates, *et al. vs.* Bank of Staplehurst. Petition in Error of Louisa Hamer, Adm'x. Supreme Court of Nebraska. Filed Nov. 28 1902 Lee Herdman Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Petition in Error of David E. Thompson, in the words and figures following, to-wit:

9 In the Supreme Court of the State of Nebraska.

DAVID E. THOMPSON, Plaintiff in Error,
vs.
BANK OF STAPLEHURST, Defendant in Error.

Petition in Error.

The plaintiff complains of the defendant, for that on the 21st day of July, 1902, the defendant herein recovered a judgment against the plaintiff herein, in the district court of Seward County, Nebraska, for the sum of $13,510.96 and costs amounting to the sum of $—. That subsequently, and on the 22nd day of October, 1902 at the same term of said court, an order was made by said court requiring the said defendant in error to remit a portion of said judgment, as the same was excessive to the extent of $347.42; and that said defendant in error filed a remittitur in obedience to the order of said court, and judgment was then formaly entered in favor of the defendant in error and against this plaintiff in error, in the sum of $13,163.54 in said action pending in said court, wherein the defendant herein was plaintiff and the plaintiff herein was defendant.

A transcript of said judgment, pleadings and proceedings in said cause, together with the bill of exceptions containing all of the evidence introduced, is filed herewith.

The plaintiff alleges that there is error in said proceedings and judgment, in this:

1st. The court erred in overruling the objections of this defendant below to the introduction of any testimony, at the time the same was offered on the trial of said cause, as appears by the bill of exceptions in said cause, page 8; said objection being based upon the character of the case as made in the plaintiff's petition, it being strictly and specifically alleged that the defendant below in
10 the several acts of misconduct, negligence, misfeasance and fraud of which the plaintiff complained, acted in his official capacity as a director of the Capital National Bank; and that acting as such director it became and was his duty under the law, as well as the by-laws of said National Bank, as is alleged, to do various and sundry things which he neglected to do, and which he purposely omitted to do; and that in his official capacity, and acting as such director, he did various things, as is specifically alleged, in violation of his duties and obligations as a director of said bank, under the law and the by-laws of said bank, thereby causing heavy losses to the said bank, which caused its insolvency, and which it is alleged resulted in a damage to the plaintiff below; whereas, if said allegations of misfeasance, nonfeasance and fraud of said defendant

below in his capacity as a director of said National Bank were true, any damage caused by the facts alleged would be a direct damage to said bank, and any recovery therefor would be an asset of said bank to be ratably distributed among the creditors and stockholders of said bank; and such damages were recoverable alone by said bank, or the receiver of said bank, and not by the plaintiff below in its individual capacity against the defendant below.

2nd. The court erred in rendering judgment against the defendant below, for the reason that under the issues joined and the evidence introduced, the plaintiff below was not entitled under the law to recover a judgment for itself individually against the defendant below in his individual capacity or otherwise; and for the reason that whatever damage there was, if any, caused by the negligence, misconduct and fraud of the defendant below in his capacity as a director in the Capital National Bank, was recoverable alone by said Bank or the Receiver of said Bank, and not by the plaintiff below.

3rd. The court erred in refusing to give the first paragraph of the instructions requested by this plaintiff in error, defendant below,

11 for the court to direct the jury to return a verdict in favor of the defendant below, being numbered 1, and found in the transcript on page 69.

4th. The court erred in giving the eleventh paragraph of the instructions given by the court, numbered 11th, found on page 52 of the transcript.

5th. The court erred in giving to the jury the sixteenth paragraph of its charge to the jury, numbered 16th, where he undertakes to define the actionable negligence of a director of the bank in not discovering the embezzlement of funds by the president of the bank or of the cashier, thus fixing a liability not recognized by the law fixing and defining the duties of directors of national banks, and in direct violation of the principle and requirements specified in Sections 5239 and other sections of the National Banking Act.

6th. The court erred in giving the seventeenth paragraph of its instructions to the jury, numbered 17th, for the same reasons as set forth in the assignment of errors concerning the giving of the sixteenth paragraph above mentioned.

7th. The court erred in refusing to give the sixth paragraph of the instructions requested by the defendant below, numbered 6th, wherein the duties and liabilities of directors of national banks are defined in accordance with the provisions of the National Banking Act.

8th. The court erred in each one of its instructions to the jury in the construction and application of the duties and liabilities of directors of national banks under the national banking act, as shown by paragraphs of the charge of the court to the jury numbered 9th, 10th, 11th, 16th and 17th.

9th. The court erred in overruling the motion for a new trial.

10th. The court erred in entering judgment against the defendant David E. Thompson, for the reason that the plaintiff's cause of action, if it ever had any against him, did not accrue to it within five years prior to the commencement of said action; and said action was

barred by the statute of limitations as against said defend-
12–14 ant.

The plaintiff therefore prays that said judgment may be reversed and said cause of action dismissed, and that said plaintiff in error go hence without costs.

H. F. ROSE AND
J. W. DEWEESE,
Att'ys for Pl'ff in Error.

Endorsed: No. 13033. Charles E. Yates, *et al. vs.* Bank of Staplehurst Petition in Error of David E. Thompson Supreme Court of Nebraska Filed Nov. 28 1902 Lee Herdman, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Transcript in the words and figures following, to-wit:

District Court of Seward County, Nebraska.

Pleas before the District Court of the Fifth Judicial District of Nebraska in and for the County of Seward, at a term thereof begun and holden in the City of Seward, in said County and State, on the 19th day of May One Thousand Nine Hundred and Two.

Present: Honorable S. H. Sornborger, Judge. J. M. Calder, Clerk.

BANK OF STAPLEHURST, a Corporation Duly Organized and Doing Business at Staplehurst, Nebraska, Plaintiff,

vs.

CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STUART, DAVID E. THOMPSON, RICHARD C. OUTCALT, and ROLLO O. PHILLIPS, Defendants.

* * * * * * *

15 And afterwards on the 16th day of March, 1899, there was filed in the office of said Clerk a certain Amended petition, in
16 words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, a Corporation Duly Organized and Doing Business at Staplehurst, Nebraska, Plaintiff,

vs.

CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STUART, DAVID E. THOMPSON, RICHARD C. OUTCALT, and ROLLO O. PHILLIPS, Defendants

Amended Petition.

The plaintiff for its amended petition complains of the defendants and allege that the plaintiff is a corporation duly organized and

doing a general banking business, with its principal place of business at Staplehurst, Nebraska.

That on, prior, and subsequent to the 9th day of December, 1892, and at the several times hereinafter mentioned, the defendants acted as the directors and officers of the Capital National Bank; that they acted as such officers and directors and as such had the control and management thereof and which said Capital National Bank was a corporation duly organized and doing a general banking business in the City of Lincoln, Nebraska.

That acting as such directors and officers of said bank, it became and was the duty of the defendants and each of them under the law as well as the by-laws of said bank to actively and actually manage and superintend the business of the same, to examine the books of said bank including loans and discounts, to examine the loans made, to whom made, the security therefor, and when due; to see that the general condition of said bank corresponded with its books, to see that the resources and liabilities of said bank corresponded with the books of said bank, to see that all notes and bills receivable held by said bank and entered upon its books and in its statements as valuable assets were in fact good valuable and collectable, and to see that all such as were worthless or of little or no value were charged off from the assets of said bank and not in-
17 cluded in its statements, to see that the valuable effects, assets, and other matters including the cash on hand and in other banks or depositories agreed with the books of said bank.

That the defendants and each of them failed to perform the aforesaid duties and each and all of them imposed upon them by law, and by the by-laws of said bank, and by reason of such failure large loans were made by the bank to insolvent persons upon inadequate or no security, and to its officers, and to those who were relatives and favorites of the defendants as officers or acting officers of the bank.

That the books of said bank were out of balance, that they allowed and permitted forced balances to be made and carried on the bank books, the deposit account was falsified, being greatly understated, the real estate, bills receivable, and deposit account each being largely inflated that they permitted to be carried on the books of the bank and permitted and caused to be published statements and advertisements, wherein they included as valuable assets of the bank large and numerous notes and bills receivable from persons as due and owing to the bank from persons who were worthless and irresponsible, and also included in their statements of the resources and liabilities of said bank, and also upon its books as good and valuable, numerous notes, bills receivable and other resources in large amounts that were either wholly worthless or of little or no value, and also permitted large amount- of notes, bills receivable and other items, due the bank to remain past or overdue without taking steps to collect or secure the same, whereby the same were lost to the bank and became and were entirely worthless; and they permitted and continued from time to time to carry such worthless and valueless notes, bills receivable and other assets upon the books of said bank as a part of its valuable and available assets, when they knew, or

should by proper diligence and examination have known the same to be wholly worthless and of no value, and from time to time they published, permitted, allowed and caused to be published
18 to the public and informed and represented to plaintiff in the numerous statements made by them to plaintiff that such notes, bills receivable, and other worthless assets were good and collectable and part of the valuable resources and effects of said bank when in truth and in fact they knew and were in duty bound to know said statements and each and all of them to be false and utterly untrue; that the resources of said bank were largely inflated and the liabilities thereof largely shrunken, and the published statements and advertisements and the books of the bank did not show its true condition in this, that bank by its books and the published statements and advertisements showed that it was in good sound financial condition when it was in truth and in fact in an insolvent condition, and was and had been in an insolvent condition since and prior to December 9th, 1892, and that such insolvency resulted from the careless and negligent manner in which the defendants acting as such directors and officers managed and superintended the bank and its business, and — all of which said facts and circumstances the defendants, and each of them, had full knowledge, and it was the duty of each of them under the law to so know and inform themselves regarding the true condition of said bank.

That after said bank became insolvent as aforesaid the defendants made, caused, allowed and permitted to be made statements to the plaintiff and the public showing said bank to be solvent, its capital stock unimpaired, and a surplus on hand, and so continued to publish, cause, allow and permit to be published said statements showing it in the condition aforesaid until it closed its doors and ceased doing business on January 21st, 1893. That after the insolvency aforesaid it continued to pay out large semi-annual dividends on its stock of from 4 to 8 per cent. until within a short time of its closing its doors as aforesaid and ceasing to do business.

That after said bank became insolvent as aforesaid the said defendants permitted the said bank to continue in business and re-
19 ceive deposits from plaintiff and others, the defendants having knowledge of such insolvency, or ought to have known, and could have known by the exercise of ordinary care in the discharge of their duties as directors, or acting as directors, but *for* the insolvency of said bank this plaintiff was at all times entirely ignorant.

That while said bank was insolvent as aforesaid the defendant negligently and fraudulently caused and permitted advertisements and statements to be made and published in the Lincoln, Nebraska daily and weekly newspapers, setting forth the solvency of said bank for the purpose of inducing plaintiff, and others, and the public generally, to deposit and keep money in said bank, and the plaintiff relying upon said published statements as it had the right to do, deposited and loaned its money to said bank as hereinafter stated.

That if it had not been for such false statements aforesaid and for

those hereinafter set forth this plaintiff would not have deposited and loaned any money to said bank as it continued to do from time to time as hereinafter set forth, nor would it have allowed the same to remain therein, but on account of the false statements referred to aforesaid it allowed the same to remain on deposit, when but for said false and untrue statements it would have promptly withdrawn its loans and deposits before the failure of said bank and that it was prevented from so doing by reason of said false and untrue statements aforesaid showing said bank to be in a good, sound financial condition, when in truth and in fact it was not in a good sound financial condition, but was wholly and utterly insolvent.

That on the 9th day of December, 1892, said bank being insolvent as aforesaid, the defendants for the purpose of inducing the plaintiff and others to do and continue business with and to loan and deposit money with said bank, made, caused, allowed and permitted a false statement of the condition of said bank, and its resources and liabilities, which said statement was hereto at-
20 tached and marked Exhibit "A," which said statement was made, caused and allowed and permitted to be made by the said defendants *acting* as such directors and officers of said bank, for the purpose of deceiving the plaintiff and others and inducethe plaintiff and others to do and continue doing business with said bank as aforesaid, and said defendants on said date caused, allowed and permitted said false statement to be published in the newspapers of general circulation in Lincoln, Nebraska, and which said paper-aforesaid were of general circulation in the State of Nebraska.

Plaintiff further avers that on the 28th day of December, 1886, the said defendants and each of them acting as such directors and officers of said bank for the purpose of deceiving the plaintiff and others and for the purpose of inducing the plaintiff and others to believe said bank sound, solid and solvent, and to induce the plaintiff and others to do business with said bank as aforesaid made, caused, allowed and permitted to be made a false statement of its resources and liabilities, a copy of which statement is hereto attached, and marked "Exhibit B," and caused, allowed and permitted said statement to be published in various newspapers in general circulation in the City of Lincoln, Nebraska, which said newspapers were of general circulation in the State of Nebraska, for the purpose and with the intent to induce this plaintiff and others to loan money and deposit money with said bank, when in truth and in fact said bank was not — a sound, solid, safe and solvent condition, but was wholly insolvent.

This plaintiff avers that on and between July 23rd, 1884 and January 21st, 1893, the defendant with the fraudulent intent and purpose as aforesaid, during all of said time made, allowed, caused and permitted to be made at divers intervals false statements of the condition of said bank as to its resources and liabilities with the intent and purpose of deceiving the plaintiff and others as aforesaid and caused, acquiesced in, allowed and permitted said false
21 statements, and each of them severally to be published in newspapers of general circulation in the City of Lincoln, Ne-

braska, which said paper- aforesaid were of general circulation in the State of Nebraska.

And plaintiff avers that said statements and each of them showed, and the defendants in each of said statements, and by said statements, represented that said bank was in a thoroughly sound, safe and solvent condition and was doing a prosperous business and was in all respects a safe and secure institution with which to do business, and a safe bank in which to make deposits and loans of money, and said statements were prepared and published and were caused, permitted and allowed to be prepared and published by said defendants for the purpose of making it appear to this plaintiff and others that said bank was sound, safe and solvent, and thereby inducing this plaintiff and others to believe and rely on said statements as aforesaid; that said statements and each of them as made and published stating the resources and liabilities of said bank as aforesaid, were read and looked over by the officers of the plaintiff's corporation, which officer- were in the full control and management of plaintiff's business, and plaintiff avers that it believed them to be true and correct statements of the condition and resources of said bank, and that during said period of time, the exact times of which plaintiff cannot at this time state, the said defendants had conversations with the officers of said plaintiff as aforesaid at divers times and during the time when said published statements were made as aforesaid between July 23rd, 1884 and January 21st, 1893 in which said conversations said defendants represented said bank of which they were directors and acting directors and officers was thoroughly safe and sound, and believing said published statements and advertisements as aforesaid and said verbal representations so made by said defendants to be true, and believing them to be true and relying upon the same, that said bank was sound, solid and solvent, and doing a flourishing and prosperous business, as said published statements and advertisements showed, and as represented in said
22 verbal statements, this plaintiff on the 11th day of February, 1886, loaned to and deposited with said bank, of which defendants were the directors and acting directors, and officers, a sum of money, and continued to loan and deposit with said bank from said date from time to time large sums of money up to and including the 21st day of January, 1893, which said sums of money, so loaned and deposited with said bank varied, as plaintiff during all of said period withdrew and reloaned to said bank said divers sums of money, and plaintiff avers that on the 1st day of January, 1893, plaintiff had a balance to its credit amounting to Eight Thousand One Hundred Fifteen and 34/100 ($8,115.34) Dollars, money it had loaned to and deposited with said bank, and from January 1st, 1893, to and including Jany. 21st, 1893, (the day said bank closed its doors and ceased to do business) the plaintiff loaned and deposited with said bank the following sums of money, to-wit:

January	2nd,	1893	$547.90
"	3,	"	503.00
"	5,	"	527.62
"	6,	"	800.00
"	7,	"	1326.57
"	7,	"	306.00
"	9,	"	2693.16
"	10,	"	39.25
"	11,	"	1357.42
"	12,	"	3103.42
"	14,	"	632.01
"	16,	"	2046.00
"	16,	"	168.59
"	16,	"	139.23
"	18,	"	1507.38
"	18,	"	1293.04
"	19,	"	215.00
"	20,	"	890.00
Balance due plaintiff on January 1st, 1893			8115.34
Making total amount due plaintiff from Capital National Bank			$26210.93

That on sundry dates between January 1st, 1893 and January 21st, 1893, plaintiff withdrew from said bank $11,264.11, leaving still due and owing from said Capital National Bank to the plaintiff the sum of $14,946.82, which said sum now remains due plaintiff and wholly unpaid except as hereinafter stated.

23 Plaintiff avers that said statements and advertisements so published as aforesaid, and said statements as verbally announced to the officers of said plaintiff, were, as the defendants and each of them well knew, and were in duty bound to know grossly exaggerated and wholly false and untrue, and that the liabilities of said bank were in each of said statements and advertisements grossly misstated, and the resources inflated and exaggerated as hereinbefore stated.

That whereas said statements and advertisements, and each of them, as well as said verbal statements made and caused, allowed and permitted to be made to the officers of plaintiff as aforesaid, showed that said bank was sound, solid and solvent, and doing a flourishing business, when in truth and in fact said Bank was not doing a flourishing and a prosperous business, and was in fact at the time said statements and advertisements were published and verbally made, in an unsafe, precarious and insolvent condition, and at the time of the last published statement as aforesaid, and for a long time prior thereto, was in fact insolvent and could not pay the money owing plaintiff and others.

That the true condition of said bank was well known to said defendants at the several times they made said statements and advertisements as published and as verbally made to the officers of plaintiff, but notwithstanding they knew its unsafe and insolvent condi-

tion and had full access to its books and accounts and were in a position to know, and it was their duty to know the true condition of said bank, and they and each of them should and could have known its true condition by the exercise of ordinary care in the discharge of their duties as directors and acting directors and they and each of them willfully, negligently and recklessly for the purpose and with the intent aforesaid, made and caused, allowed and permitted to be published said false statements and advertisements and verbal false statements as hereinbefore set forth for the purpose of inducing the plaintiff and others to do business with
24 and make loans to and deposit money in said bank.

Plaintiff further avers that its knowledge of the condition of said bank was wholly derived from said published statements and advertisements, and by said verbal statements so made to its officers by said defendants, and that had said statements and advertisements so published and as verbally made as aforesaid, set out and given the true condition of said bank, it would have appeared, and would have been shown that said bank was not sound, solid and solvent, and that it was not a safe institution in which to do business, and the plaintiff would not have made said loans and deposits with said bank.

Plaintiff avers that after making said loans and deposits with said bank, which were each and all made by plaintiff relying upon said statements and advertisements as aforesaid, to-wit: on the 21st day of January, 1893, said bank suspended business and went into the hands of the receiver, and that said bank was then, and had been for many years prior thereto and at the time of publishing said statements and advertisements and making such verbal statements by said defendants to the officers of the plaintiffs as aforesaid insolvent and unable to meet its obligations, and could not pay its debts, and did not have the assets and resources that said defendants represented it had in said published statements and advertisements and verbal statements, made as aforesaid, and that by reason thereof said bank could not pay and did not pay this plaintiff any part of said sum of money loaned and deposited with said bank, except the sum of $2,241.22, and that the remainder of said money so loaned and deposited with said bank has been wholly lost to this plaintiff by reason of the facts hereinbefore set forth.

Plaintiff states that by reason of facts as above set forth and the false and fraudulent statements, advertisements, and representations of the defendants the plaintiff has been damaged in the sum of Twenty Thousand ($20,000) Dollars.

25 Wherefore, plaintiff prays judgment against the defendants, and each of them for the sum of Twenty Thousand (20,000) Dollars, its damages, with interest thereon from January 21st, 1893, at 7 per cent. and costs of suit.

BANK OF STAPLEHURST, NEBRASKA, *Plaintiff,*

By BURR & BURR,
GEO. W. LOWLEY, &
BIGGS & THOMAS,
Its Attorneys.

THE STATE OF NEBRASKA, *Seward County, ss:*

J. J. Thomas being first duly sworn on his oath deposes and says that he is one of the attorneys and agents of plaintiff; that he has read the foregoing petition and knows the contents thereof, and that the same are true as he verily believes; that plaintiff is a corporation and further he saith not. J. J. THOMAS.

Subscribed in my presence and sworn to before me this 3rd day of May, A. D., 1897.

[SEAL.] R. S. NORVAL,
Notary Public.

My commission expires May 5th, 1897.

"EXHIBIT A."

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business December 9, 1892.

Resources.

26	Loans and discounts		$768,601.14
	Overdrafts secured and unsecured		6,217.74
	United States Bonds to secure circulation		50,000.00
	Stocks, securities, etc		325.00
	Due from approved reserve agents		107,090.01
	Due from other National Banks		17,800.33
	Due from State Banks and Bankers		5,394.72
	Banking house, furniture and fixtures		5,770.00
	Other real estate and mortgages owned		38,716.92
	Current expenses and taxes paid		14,286.28
	Checks and other cash items		3,698.56
	Exchange of clearing house		8,841.16
	Bills of other Banks		2,355.00
	Fractional paper currency, nickels and cents		298.71
	Specie		26,789.50
	Legal tender notes		17,431.00
	Redemption fund with United States Treasurer (5 per cent. of circulation)		1,350.00
	Total		$1,074,867.37

Liabilities.

	Capital stock paid in		$300,000.00
	Surplus fund		6,000.00
	Undivided profits		21,180.75
	National Bank notes outstanding		45,000.00
	Individual deposits subject to check	$356,139.33	
	Demand certificates of deposit	158,545.14	
	Due to other National Banks	81,574.14	
	Due to State Banks and bankers	47,372.89	
			643,632.24
	Note and bills rediscounted		59,054.38
			$1,074,867.37

STATE OF NEBRASKA, *Lancaster County, ss:*

I, R. C. Outcalt, Cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief. R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15th day of December, 1892.

HAL C. YOUNG,
Notary Public.

Correct.
Attest:
C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,
Directors.

27 "EXHIBIT B."

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business December 28th, 1886.

Resources.

Loans and discounts		$737,462.12
Overdrafts		3,974.33
U. S. Bonds to secure circulation		50,000.00
Other stock, bonds and mortgages		22,739.34
Due from approved reserve agents		74,068.63
Due from other National Banks		56,215.29
Due from State Banks and Bankers		10,495.36
Real Estate, furniture and fixtures		7,177.33
Current expenses and taxes paid		8,885.65
Premiums paid		7,188.43
Checks and other Cash items		13,742.02
Bills of other Banks		3,712.00
Fractional paper currency, nickels and cents		216.42
Specie		27,308.00
Legal tender notes		10,400.00
Redemption with U. S. Treasurer (5% circulation)		1,900.00
Total		$1,035,448.92

Liabilities.

Capital stock paid in		300,000.00
Surplus funds		12,000.00
Undivided profits		28,439.38
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$414,962.35	
Demand certificates of deposit	40,859.66	
Due to other National Banks	107,648.27	
Due to State Banks and Bankers	37,448.66	
		597,918.94
Notes and bills rediscounted		52,090.60
Total		**$1,035,448.92**

STATE OF NEBRASKA, *Lancaster County, ss:*

I, C. W. Mosher, President of the above Bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

C. W. MOSHER, *President.*

28 Subscribed in my presence and sworn to before me this 11th day of October, 1886.

E. R. SMITH, *N. P.*

Correct.
Attest:
C. W. MOSHER,
C. E. YATES,
D. E. THOMPSON,
Directors.

And afterwards, on the 15th day of April, 1899, there was filed with said Clerk a certain Demurrer herein in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST
vs.
CHARLES W. MOSHER ET AL.

Now comes the defendants Charles E. Yates, Ellis P. Hamer, and David E. Thompson & all other defendants and demur to the amended petition as amended by interlineation, for the following reasons:

1st. The said petition shows that this court has no jurisdiction to try and determine the issues in said action, the petition showing that the cause is founded upon the acts of negligence of the defendants as directors of the Capital National Bank and the alleged violation of their duty under the National Banking Act.

2nd. The said petition does not state facts sufficient to constitute a cause of action against these defendants and in favor of the plaintiff.

F. M. HALL,
J. W. DEWEESE, &
F. E. BISHOP,
Att'ys for Def'ts.

And afterwards, on the 11th day of June, 1901, the following order of Court was had herein, to-wit:

29 1792.

BANK OF STAPLEHURST, Plaintiff,
vs.
CHAS. MOSHER ET AL., Defendants.

And now on this day this cause came on to be heard on the demurrer to the petition, and said demurrer is overruled by the Court, to which ruling the defendant excepts, and the defendants have 40 days in which to file an answer.

And afterwards, on the 15th day of July, 1901, there was filed in the office of said Clerk a certain Answer in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST
vs.
CHARLES W. MOSHER ET AL.

Separate Answer of David E. Thompson to Plaintiff's Petition as Amended by Interlineation March 16, 1899.

Now comes the defendant David E. Thompson, and in obedience to the order of the Court, makes answer for himself to the plaintiff's petition as amended by interlineation on the 16th of March, 1899.

This defendant says that whether the plaintiff made the deposit in the Capital National Bank of Lincoln at the times and in the amounts stated in said amended petition, this defendant has not knowledge or information, and he therefore denies that such deposits were made.

First Defense: This defendant for himself alleges that the Capital National Bank of Lincoln referred to in said amended petition, was organized and had its existence under and by virtue of the national banking act passed and approved by the Congress of the United States.

That Homan J. Walsh was the vice-president of said bank
30 and Richard C. Outcalt was the cashier of said bank, and that each of the other defendants was a director of said bank, and the defendant David E. Thompson was a director for a short time in said bank, but was not such director at the time any of the deposits were alleged to have been made by the plaintiff in the Capital National Bank, and during such time he was simply a stockholder in said bank. That said bank was closed by the national bank examiner on or about the 23rd day of January, 1893, and that soon after said date a receiver was duly appointed by the Comptroller of the Currency to take charge of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment.

That no forfeiture of the franchises of the said banking association has ever been declared by the Comptroller of the Currency or adjudged by any court, for the reason of the violation of the national banking act by the directors and officers of said bank, or for any other reason.

That the duties and obligations of the directors and stockholders of said bank were such and only such as were required by the national banking act under which said bank was organized and existing.

This defendant denies that he made, signed or attested the report purporting to show the condition of said bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

The defendant further says that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true, constitute a violation by this defendant as a director or stockholder, of his duties as such director or stockholder as laid down and defined in the national banking laws of the United States above referred to, concerning the government and
31 management of national banks. And this defendant alleges that if any liability attaches to him as a director or stockholder of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of this defendant, there is necessarily involved the construction of said national banking act relating to the duties of directors and stockholders of national banks. That a federal question is involved in determining the liability of this defendant by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of this defendant.

This defendant further answering for himself denies each and every allegation in the plaintiff's petition, except as hereinbefore stated or admitted.

Second Defense: This defendant further says for himself, that the plaintiff on or about the 27th day of October 1893, brought an action against these same defendants in the district court of Lancaster County, Nebraska, on the same cause of action as *not* set out in the plaintiff's amended petition, and that a removal of said cause of *each* from the Lancaster County District Court to the United States Circuit Court for the District of Nebraska was duly made, and after the filing of said cause of action in the said United States Court on removal, a motion was duly made by the plaintiff, the Bank of Staplehurst, to remand said cause to the District Court from which it had been removed and which motion was overruled. And this plaintiff on its own motion dismissed said cause of action, and a judgment for costs was rendered in said court against the plaintiff and in favor of the defendants and the other defendants herein in the sum of $125.73 and the plaintiff has failed and neglected to pay the said judgment for costs. That said judgment is in full force and effect and remains unsatisfied.

This defendant therefore avers that the plaintiff, under the
32 law, and the practice, it is and ought to be barred and estopped from prosecuting this defendant on this claim, on account of its failure to pay said judgment for costs. That this litigation is vexatious and an abuse of the process of this court and this action should be dismissed out of the court.

Third Defense: As a further defense to the plaintiff's pretended cause of action as set forth in its petition as now amended, this defendant says for himself that said cause of action now pending was commenced in the District Court of Seward County, Nebraska, on or about the 25th day of February, 1895, by said plaintiff, making Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt and Rollo O. Phillips, defendants. That on or about the 9th day of July, 1895 the said plaintiff took judgment in this action against the defendant Ambrose P. S. Stuart, for the full amount of his claim as made against all of the defendants, the plaintiff's cause of action being a joint and several claim against each and all of the defendants. That said judgment so rendered in the District Court of Seward County in favor of the plaintiff Bank of Staplehurst and against the said defendant Stuart has not been reversed or set aside, but in due course of time execution were issued on said judgment for the collection of the same, and levies were duly made upon the property belonging to the said defendant Stuart and said property was sold in satisfaction of the said judgment rendered in favor of the plaintiff Bank of Staplehurst. And this defendant alleges the fact to be that the plaintiff's claim against this defendant and the other defendants so ripened into judgment has been fully paid and satisfied, and the judgment should be discharged of record if it has not already been discharged, and that said judgment so taken by the said Bank of Staplehurst against the said defendant Stuart and the payment thereof is a complete bar against any further judgment or claim in favor of the said plaintiff against this defendant and the
33 other defendants in said cause.

Fourth Defense: This defendant for a further and separate defense to the plaintiff's cause of action, says that as hereinbefore alleged in the first defense in this answer, this defendant in all of his actions concerning and in connection with the said bank, acted in his capacity as director and stockholder of said national bank, and if he neglected any duty as such director or stockholder or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against the defendant sounding in damages, said cause of action existed, if any, in favor of the said bank or the receiver of said bank after his appointment, and not in favor of the plaintiff.

This defendant alleges the fact to be that if the plaintiff deposited his money in the said bank as alleged, and the bank then failed and became insolvent, the plaintiff could not individually recover the said money from the said bank; and that the said money as well as any damage caused by the alleged neglect of duty on the part of this defendant, did not give rise to any cause of action in favor of

this plaintiff; but alleges the fact to be that if such damages resulted from the conduct or neglect of duty on the part of the defendant, a judgment therefor under the law could only be recovered by the said bank in its corporate capacity or by the receiver of said bank; and such damages when recovered, would under the law be distributed ratably by the said bank or by the receiver of said bank, among the creditors and stockholders of said bank.

This defendant for himself denies all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

This defendant therefore alleges that the plaintiff has no cause of action against this defendant.

34–39 Wherefore, the defendant prays judgment for costs.

J. W. DEWEESE &
F. E. BISHOP,
Att'ys for Def'ts.

* * * * * * *

40 And afterwards on the 15th day of July, 1901, there was filed in the office of the said Clerk a certain answer in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST
vs
CHARLES W. MOSHER ET AL.

Separate Answer of Charles E. Yates and Ellis P. Hamer, to Plaintiff's Petition as Amended by Interlineation March 16, 1899.

Now comes the defendants Charles E. Yates and Ellis P. Hamer and in obedience to the order of the court, each makes answer for himself separate, to the plaintiff's petition as amended by interlineation on the 16th of March, 1899.

These defendants say that whether the plaintiff made the deposits in the Capital National Bank of Lincoln at the times and in the amounts stated in said amended petition, these defendants have not knowledge or information, and they therefore deny that such deposits were made.

First Defense: These defendants each for himself alleges that the Capital National Bank of Lincoln, referred to in said amended petition, was organized and had its existence under and by virtue of the national banking act passed and approved by the congress of the United States. That Homan J. Walsh was the vice-president of said bank and that Richard C. Outcalt was the cashier of said bank, and that each of the other defendants was a director of said bank. That said bank was closed by the national bank examiner on or about the 23rd day of January, 1893, and that soon after said date a receiver

was duly appointed by the Comptroller of the Currency to
41 take charge of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment.

That no forfeiture of the franchises of the said banking association has ever been declared by the Comptroller of the Currency or adjudged by any court for reason of the violation of any of the provisions of the national banking act by the directors and officers of said bank or for any other reason.

That the duties and obligations of the directors of said bank were such and only such as were required by the national banking act under which said bank was organized and existing.

These defendants deny that they signed or attested the reports set out and referred to in the said amended petition, and deny that they made, signed or attested any report purporting to show the condition of said bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

These defendants further say that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true, constitutes a violation by these defendants as directors, of their duties as such directors as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And these defendants allege that if any liability attaches to them or either of them as directors of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of these defendants or either of them, there is necessarily involved the construction of said national banking act relating to the duties of directors of national banks. That a federal question is involved in determining the liability of these defendants by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of these defendants.

42 These defendants further answering, each for himself, denies each and every allegation in the plaintiff's petition, except as hereinbefore stated or admitted.

Second Defense: These defendants further say each for himself, that the plaintiff on or about the 27th day of October, 1893, brought an action against these same defendants in the District Court of Lancaster county, Nebraska, on the same cause of action as now set out in the plaintiff's amended petition, and that a removal of said cause of action from the Lancaster County District Court to the United States Circuit Court for the District of Nebraska was duly made, and after the filing of said cause of action in the said United States Court on removal, a motion was duly made by the plaintiff, the Bank of Staplehurst, to remain said cause to the District Court from which it has been removed, and which motion was overruled. And this plaintiff on its own motion dismissed said cause of action and a judgment for costs was rendered in said Court against the

plaintiff and in favor of the defendants in the sum of $125.93 and the plaintiff has failed and neglected to pay the said judgment for costs. That said judgment is in full force and effect and remains unsatisfied.

These defendants therefore aver that the plaintiff under the law and the practice is and ought to be barred and estopped from prosecuting these defendants on this claim, on account of its failure to pay said judgment for costs. That this litigation is vexatious and an abuse of the process of this court, and this action should be dismissed out of court.

Third Defense: As a further defense to the plaintiff's pretended cause of action as set forth in its petition as now amended, these defendants say, each for himself, that said cause of action now pending was commenced in the District Court of Seward County, Nebraska on or about the 25th day of February, 1895, by said
43 plaintiff, making Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt and Rolla O. Phillips, defendants. That on or about the 9th day of July, 1895, the said plaintiff took judgment in this action against the defendant Ambrose P. S. Stuart, for the full amount of its claim as made against all of the defendants, the plaintiff's cause of action being a joint and several claim against each and all of the defendants. That said judgment so rendered in the District Court of Seward County in favor of the plaintiff Bank of Staplehurst and against the said defendant Stuart has not been reversed or set aside, but in due course of time executions were issued on said judgment for the collection of the same, and levies were duly made upon the property belonging to the said defendant Stuart and said property was sold in satisfaction of the said judgment rendered in favor of the plaintiff Bank of Staplehurst. And these defendants allege the fact to be that the plaintiff's claim against these defendants so ripened into judgment has been fully paid and satisfied and the judgment should be discharged of record if it has not already been so discharged, and that said judgment so taken by the said bank of Staplehurst against the said defendant Stuart and the payment thereof is a complete bar against any further judgment or claim in favor of the said plaintiff against these defendants.

Fourth Defense: These defendants for a further and separate defense to the plaintiff's cause of action, say that as hereinbefore alleged in the first defense in this answer, these defendants in all of their actions concerning and in connection with the said bank acted in their capacity as directors of said national bank, and if they neglected any duty as such directors or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against these defendants sounding in damages, said cause of action existed, if any, in favor of the bank or the receiver
44–53 of said bank after his appointment, and not in favor of this plaintiff.

These defendants allege the fact to be that if the plaintiff deposited its money in the said bank as alleged, and the bank then failed and

became insolvent, the plaintiff could not individually recover the said money from the said bank, and that the said money as well as any damage caused by the alleged neglect of duty on the part of these defendants, did not give rise to any cause of action in favor of this plaintiff, but allege the fact to be that if such damages resulted from the conduct or neglect of duty on the part of these defendants, a judgment therefor under the law could only be recovered by the said bank in its corporate capacity or by the receiver of said bank; and such damages when recovered, would under the law be distributed ratably by the said bank or by the receiver of said bank *or by the receiver of said bank,* among the creditors and stockholders of said bank.

These defendants, each for himself, denies all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

These defendants therefore allege that the plaintiff has no cause of action against these defendants or either of them.

Wherefore, the defendants pray judgment for costs.

J. W. DEWEESE,
F. M. HALL, AND
FRANK E. BISHOP,
Att'ys for Def'ts.

STATE OF NEBRASKA, *Lancaster County, ss:*

C. E. Yates being first duly sworn, upon his oath says that he is one of the defendants in the above entitled cause; that he has read the foregoing answer, knows the contents thereof, and that the facts therein set forth are true, as he verily believes.

C. E. YATES.

Subscribed in my presence and sworn to before me by the said C. E. Yates, this 15th day of July, A. D., 1901.

[SEAL.] WM. B. KIRBY,
Notary Public.

* * * * * * *

54–57 And afterwards, on the 24th day of August, 1901, there was filed in the office of said Clerk a certain Reply in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Reply to the Separate Answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher, David E. Thompson, and Richard C. Outcalt.

And now comes the plaintiff and for its reply to each of the separate answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher,

David E. Thompson and Richard C. Outcalt, *and* denies each and every allegation of new matter contained in their several answers.

BANK OF STAPLEHURST,
By E. JACOBS, *President.*

* * * * * * *

58 And afterwards, on the 28th day of May, 1902, there was filed with the Clerk of said Court a certain Stipulation in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

THE JONES NATIONAL BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

UTICA BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Stipulation.

The parties to this stipulation in each of the above entitled causes which are now pending in the District Court of Seward County, Nebraska, hereby stipulate and agree that all of said cases shall be tried in the District Court at one and the same time, and that the evidence proper and applicable in any one case, or to any of the parties to this stipulation, whether plaintiff or defend-
59 ant, subject of course to the objections of either of the parties to this stipulation and governed by the ruling of the Court, shall be offered and produced and the cases respectively disposed of by court and jury, unless another trial is granted by the court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence, in so far as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation, shall be considered by the jury in such case in the disposition thereof; such evidence being properly applied to any one or to all of the parties to this stipulation as the facts of the case may warrant.

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or

proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in such case may be received, and that then the whole evidence as thus introduced shall be properly applied to each respective case and to each respective party thereto under the rulings and directions of the Court, subject to the objections of either party.

It is therefore agreed that if either party or any party to any of said causes represented in the stipulation shall desire to prosecute error from the judgment of the District Court in any or in all of said cases, a transcript of the testimony given on the trial of all of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one bill of exceptions and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said
60 & 61 cases, and that the bill of exceptions settled in one case shall be the bill of exceptions in each and all of said cases.

In Witness Whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,
J. J. THOMAS,
Attorneys for Plaintiffs.
H. F. ROSE AND
J. W. DEWEESE,
Attorneys for D. E. Thompson.
J. W. DEWEESE,
Att'y for Def'ts Yates, Walsh Estate, & Hamer Estate.
CHAS. O. WHEDON,
Attorney for Chas. W. Mosher and R. C. Outcalt.

* * * * * * *

62 And afterwards, on the 28th day of May, A. D., 1902, the following proceeding was had of court herein, to-wit:

BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

And now on this 28th day of May, A. D 1902, the same being a day in the regular May 1902 term of said District Court, came the parties to this action, and the attorneys, and also the following named persons as jurors, to-wit: M. Mikkelson, O. E. Imm, Joseph B. Wolf, August Gade, J. J. Endicott, F. Ihde, H. Meinberg, J. M. Dailey, C. D. Becker, John Martin, George Moore, and
63–68 John Mertz, who were duly empaneled and sworn according to law, and the trial proceeds.

And on the same day comes the defendants and excepts to certain portions of the deposition of J. W. McDonald, on consideration

whereof said exceptions are overruled. Defendant- excepts to the ruling of the Court.

And the hour of adjournment having arrived, and the trial of said cause not having been concluded, the further hearing and trial thereof is continued until tomorrow morning at 9 o'clock.

* * * * * * *

69 And afterwards, on the 19th day of June, 1902, there was filed of record in the office of said Clerk a certain instructions to the jury, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST
v.
CHARLES W. MOSHER ET AL.

JONES NATIONAL BANK
v.
CHARLES W. MOSHER ET AL.

UTICA BANK
v.
CHARLES W. MOSHER ET AL.

THOMAS BAILEY
v.
CHARLES W. MOSHER ET AL.

Instructions to Jury.

GENTLEMEN OF THE JURY:

1st. The jury are instructed that these actions were brought against C. W. Mosher, President of the Capital National Bank, and R. C. Outcalt Cashier of said Bank, and against D. E. Thompson, Charles E. Yates, Ellis P. Hamer and R. O. Phillips as directors of said bank, and Homan J. Walsh as Vice President of said bank, the defendants Walsh, Hamer and Phillips have since died; and the estates of Hamer and Walsh are represented in these actions by their administrators. No revivor of the action against R. O. Phillips has been had, and consequently you can not find any verdict against Phillips.

Given.

2nd. All the foregoing entitled cases are submitted to you for determination at one trial and on the same evidence, so far as
70 such evidence is applicable to the respective cases and to the respective defendants. Each of the defendants makes a separate defense, and each defendant in each of the cases can only be bound or affected in any way by such evidence as may be applicable to him and to his conduct under the charges made in the respective petitions of each case.

Given.

3rd. The jury are instructed that in considering the various charges and allegations made against each defendant in the several cases submitted to you, you are not to arrive at any conclusion or determine any fact by mere conjecture or speculation; and you are further instructed that the burden of proof is upon the plaintiff to establish the facts alleged against any defendant in these several actions; and you must determine such facts from the evidence relating to such charges and facts and not determine the same by inference, not founded upon evidence, conjecture or guess-work.

Given. S. H. Sornborger, Judge.

Defendant- severally excepts.

4th. The jury are instructed that if you find that one or more of the defendants named in each of said cases have been guilty of negligence, misconduct and fraud, charged in said petition in the several cases, that fact would not affect any one of the other defendants, nor make such other defendants, or any one of them guilty of such negligence, misconduct or fraud. In other words, although you may believe from the evidence that one of the defendants named had done and committed or neglected the things charged in the petitions in the different cases under the proof rendered, yet you are instructed that the negligence and misconduct and fraud of each defendant can be attributed to no one of the other defendants without proof that such other defendant, or defendants participated therein.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

Second 4th. Each of the plaintiffs above mentioned alleged substantially, in the same or similar form, the same general allegations in their petitions, the principal difference in the petition- being the amount *of* each severally alleges it had on deposit, or had
71 loaned to the Capital National Bank, of whom the defendants are alleged to be officers and directors, and the amount claimed in their several petitions, and the sums which should be credited to them as having been either paid by the Receiver of the bank at divers times, to-wit: 17%, and the amounts which were realized on the sale of the property of a former defendant in this action, Stuart, to be ratably applied, is undisputed and the several amounts, together with interest thereon to this date *is* as follows: The Bank of Staplehurst, $13,510.96, Jones National Bank, $16,888.43, Utica Bank $8,292.92, Thomas Bailey $11,054.69.

And these several sums are the amounts to be named in your verdict as the sum which the said several plaintiffs may recover against the defendants whom you may find liable under the evidence and instructions, in case only your verdict should be for the plaintiffs, or such of them as you may find in favor of.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

5th. Each of the several plaintiffs allege that the defendants mentioned in said several petitions were the officers and directors of the Capital National Bank, doing a banking business in the City of Lincoln, and that by reason of the statements made by such officers

and published in the Nebraska State Journal, and the Evening Call, newspapers alleged to be published in Lincoln, of the condition of said bank, and showing said bank to be in a solvent and prosperous condition, the said several plaintiffs were induced to, and did deposit the several sums of money indicated to you, in said bank, relying upon said representations so published as to the solvent condition of said bank.

And the plaintiffs allege that statements of its condition showing the solvency and soundness of said bank were published at divers and sundry times from the year 1886 down and including December 9" 1892.

And the plaintiffs severally allege in their several petitions that said statements as to the condition of said bank were at
72 all times during said period wholly false and untrue, and that in fact and in truth the said bank was not at any of said times or during said period solvent and in sound condition, but was in fact and in truth in an insolvent condition.

And the plaintiffs severally allege that the resources of said bank were stated in said several statements published by the said defendants grossly exaggerated, and stated to be greater than in truth they were, and that the liabilities of said bank at all times was by said published reports made to appear less than said liabilities of said bank really were, and that much of the nominal assets of said bank, such as its bills receivable and stocks and bonds were, while represented by said reports to be assets of value, in fact worthless and uncollectible, and of little or no value. And that its liabilities were much greater than was represented in said statements so published or permitted to be published by the said defendants.

That by reason of the worthlessness of said assets and by reason of the excess of its liabilities, and by reason of the mismanagement and inattention, and gross negligence of the defendants the said bank about the 21st day of January 1893 suspended business, closed its doors and was taken possession of by a receiver. And that by reason of the premises the plaintiff lost the sums of money severally, at that time on deposit in said bank as hereinbefore set forth.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

6th. The defendants answering severally, each for himself, admit their relationship as officers and directors, severally, of the bank at and during the time alleged in the petition, and admit that said bank was closed by a national bank examiner, about the 23rd day of January, 1893, and allege that it has been in the control of a receiver since that time. Each of the defendant directors, and also the defendant Walsh, denies that he signed or attested the reports of the condition of said bank referred to in said petitions and denies that he made, signed or attested any report purporting to show the condition of said bank for the purpose and in the manner

alleged of them deny every allegation of the plaintiffs' several petitions except those allegations admitted as above stated.

73 Given.

Defendants Severally Except. S. H. Sornborger, Judge.

7th. These allegations of the petitions and denials set forth in the answers constitute the issues to be tried in these cases. And the burden of proof is therefore upon the plaintiffs to show by a preponderance of the testimony the truth of the allegations contained in their several petitions.

In other words the burden is upon the plaintiffs severally to show that the defendants severally published or caused to be published or participated in the publication of statements of the condition of the Capital National Bank from time to time during its existence as by the plaintiffs severally alleged; to show that the plaintiffs each for himself, or itself, relied upon the truth of said statements of the condition of said bank, and to show that such statements were untrue, that is to say that said bank was insolvent, or that its assets were not truly stated, or that its liabilities were understated to such degree and extent as to impair its solvency.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

8th. The mere fact that a bank was insolvent at any time, or at all times, standing by itself, would not entitle the plaintiffs or any of them to recover. The mere fact that it was insolvent at any time or at all times, and that statements were published by the defendants or any of them, which were essentially false would not entitle the plaintiffs or any of them to recover. The plaintiffs, and each of them in addition to proving both the above propositions must in addition thereto prove by a preponderance of the testimony that such published statements of the condition of the bank came to their notice, and was relied upon by them, and that they acted in reliance upon them in making the loans to or deposits with said bank before they could recover from the defendants or either of them.

The mere fact, however, that other inducing causes oper-

73½ ated together with the foregoing considerations such as the obtaining of a higher rate of interest would not render the defendants or any of them less liable, provided always that such plaintiffs had notice of and relied upon the truthfulness of the published reports.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

9th. Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages sustained by one depositing money in such bank in reliance upon the false representation of the condition of the bank contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

10th. The director of a bank who publishes or participates in the publication of a report of its condition, by such act asserts that the statements contained in such report are substantially true, and he cannot rely upon his ignorance of the true condition of the bank as a defense to an action, when he in such published reports represents the bank to be solvent, if in truth it is not solvent and its assets are fictitious or worthless, or its liabilities so much greater than its assets as to render the bank insolvent.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

11th. It is not alleged by the plaintiffs and the proof does not indicate that all of the officers and directors of the Capital National Bank signed any one of the alleged public statements of the condition of the bank; it being required of the bank and its officers and directors that such statements should be verified by the oath of the president or the cashier, and attested by at least three of the board of directors, consequently it was not necessary in any one report for each, or all of the directors and officers of the bank either to sign or verify such published statement. And
74 in the particular case of the defendant H. J. Walsh, who was as before stated to you vice-president of said bank, it is not in evidence that at any time he signed his name to any of the published statements aforesaid.

It is alleged in the several petitions however, that each and all of said defendants at divers and sundry times, either as officers and directors, made out, signed and published, or caused to be made out signed and published the statements in question.

You are instructed in that behalf, that it is not necessary in order to create a liability of any one of the defendants, for the plaintiffs to show that any such director or officer actually with his own hand signed and caused to be published the statements alleged to have been published. It is sufficient if the plaintiffs have shown that such officer or director participated in making and publishing the said statements.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

12th. In determining whether or not the defendant directors or officers did in fact participate in any or all of the statements alleged, or shown to have been put forth and published, besides considering any testimony if any, which goes directly to show that such director or officer personally signed the same, you are at liberty to take into consideration the length of time such officer or director had been in the service of the bank in such capacity at the time of any particular publication, the opportunities which he had for knowing the course of events in the bank, and of knowing that the bank officers and directors were issuing statements of the condition of the bank and causing the same to be published in the public newspapers, and consider from all these facts and circumstances taken together with all the other testimony touching upon the same, whether or not he in fact participated in and assented to the issuance and publication of such statements.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

75 13th. And although you should find from the testimony that any particular director or officer of said bank did not himself directly cause to be issued and published the statements concerning the condition of said bank, yet if you should find that at the time such statements were being published in the public press, such director or officer was a resident of the City of Lincoln, was in a condition of health to be about giving his ordinary attention to business, and was not absent from home, that is absent from the City of Lincoln, such facts should be taken into consideration by you, together with the other evidence and circumstances in the case in determining whether or not that officer or director knew of and participated in the issuance and publication of any or all of the statements of the condition of said bank.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

14th. By assets of a bank are meant all that class of valuable property pertaining to and belonging to the bank, including its money, and its bonds, its real estate, its accounts of deposit with other banks and bankers, its bills receivable and its overdrafts. But a worthless overdraft, bills receivable or account, which as we commonly understand the term, is not collectible and against persons shown to be insolvent is not an asset of the bank.

The liabilities of a bank, generally speaking, consists of the items of account which it owes to other people including its deposits whether upon certificate or open account. Whether a bank is solvent or insolvent at any particular time depends upon whether its available assets as before defined, are sufficient in amount to meet its liabilities. A bank is not insolvent merely because upon any particular day, or at any particular time it should not have sufficient money or cash items of account to immediately pay all of its liabilities, but is only insolvent when all its available and good assets are insufficient to pay all its liabilities.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

76 15th. There has been testimony offered tending to show that the names of accounts in the books were not always the same as the names of the accounts published — statements of the affairs and concerns of the bank.

In that behalf you are instructed that a mere change in the name of an account, so long as the account and its nature is not actually falsified and made to appear different from what it really is, is not such a misrepresentation as can be complained of. In order to be a material misrepresentation it must be such a misrepresentation of the assets, as before defined, and of the liabilities of the bank as to misrepresent the real and actual condition of the bank.

Given.

Defendants Severally Except. S. H. Sornborger.

16th. You are instructed that proof that a president or cashier misappropriated or embezzled funds of the bank, or falsified the books of account is not of itself sufficient to establish actionable neg-

ligence against the directors who have not participated therein; but if such embezzlements or misappropriations or falsifications are of such great extent, and are of such long continuance as would have, upon reasonable examination, challenged the attention of an ordinarily prudent business man then you would be justified in finding that the directors were charged with notice of such misappropriation or embezzlements and falsifications.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

17th. It is the duty of the bank officers and directors to give the affairs of a bank such reasonable care and supervision and oversight as ordinary men of business prudence exercise in the supervision and care of their own business affairs and concerns which they delegate to the immediate administration of others.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

18th. You are instructed that the credibility of witnesses,
77 and the weight to be given to the testimony of each is a matter exclusively for the jury. The jury have the right to determine from the appearance of the witness on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all of the other surrounding circumstances appearing on the trial *find* which witnesses are the more worthy of credit, and to give credit accordingly.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

19th. In considering the weight to be given to the testimony of any witness it is proper for you, and you should take into consideration among the other matters heretofore referred to in the foregoing instructions the interest of the witness if any in the event of the suit; their temper or feeling of bias if any has been shown by them in their testimony, and their means of information as to the subject concerning which they testify, and to give such credit to the testimony of each witness as under all the circumstances such witness seems to be entitled to.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

20th. By the preponderance of the testimony the court means the greater weight of evidence; that is to say, the preponderance of evidence upon any given issue, where the evidence is conflicting upon such issue, is that which, upon consideration of all the facts and circumstances proved at the trial produces the greater impression of truth upon the mind.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

21st. The preponderance of evidence in a case is not however,
alone determined by the number of witnesses testifying to a
78 particular fact or state of facts. In determining upon which side the preponderance of testimony is, the jury should take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify, their conduct and

demeanor while testifying, their interest or lack of interest if any in the result of the suit, the probability or improbability of the accuracy and certainty of their memory of the events of and concerning which they testify, and in view of all these, when taken in connection with all other testimony in the case, or upon an issue in the case determine upon which side is the preponderance or weight of the evidence.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

1st. A director or executive of a national bank is responsible for the making and publication of a *false* report of its financial
79 condition, tho' he did not personally make and publish such statement, if he in any manner participated in the making or publication thereof. (A director of a national bank is presumed to know its true condition and that the law requires — true statement if he in any manner participated in the making or publication thereof.) A director of a national bank is presumed to know its true condition and that the law requires a true statement of its affairs to be made and published by the bank from time to time, and if one has been a director or executive officer of such a bank for a long period of time he is presumed to have knowledge of the making and publishing of the statements of its condition, and the burden is cast upon him to overcome this presumption by competent evidence.

Requested by plaintiffs.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

2nd. The jury are instructed that inasmuch as the law required that all reports made by a national bank to the Comptroller of the Currency shall be published at the expense of the bank, in a newspaper at the place where the bank is established, you have a right to consider such published reports as have been introduced in evidence in this action purporting to have — signed, and whose names appear in such published reports, as having been authorized by such defendants so appearing to have signed the same.

Requested by plaintiffs.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

22nd. You are instructed that if the evidence under the instructions of the court justify it, you may, in each case return a verdict against all of the defendants, or if it does not justify a verdict against all of the defendants, in any or all of such cases, your verdict should be returned only against such defendants as you may find liable under the evidence and instructions. If under the evidence and instructions of the court you should find against any or all of the plaintiffs, you should return a
80 verdict according to such finding.

But you are at liberty, if the evidence so justifies it to omit from either or all of your verdicts, in either or all of said cases, the name of any defendant whom — your judgment is not, under the evidence and instructions of the court liable in the premises.

Three blank verdicts in each case will be furnished you as follows: One of which in each case is a verdict in favor of the defendants. One of which in each case finds against all of the defendants. The other of which in each case in favor of the plaintiffs, has in it blanks which you may fill in with the names of such of the defendants as you may find against.

23d. For your convenience in making up your verdicts the court here states to you the full name of each of the defendants named in the several cases as follows:

Charles W. Mosher, George M. Walsh and Warren W. Walsh Administrators of the estate of Homan J. Walsh deceased; Charles E. Yates; Richard C. Outcalt; Louisa Hamer, executrix of the estate of Ellis P. Hamer, deceased; and David E. Thompson.

24th. You are instructed and you will bear in mind that in the case of the Bank of Utica *v.* Mosher, *et al.*, and in the case of Thomas Bailey *v.* Mosher, *et al.*, David E. Thompson is not a party defendant, and your verdict in those two cases could not be against said Thompson, and in the form of verdicts furnished you, if you should find against all of the defendants as before suggested is omitted the name of Thompson in those two cases. He is, however, a defendant in the other two cases in this action.

25th. At the request of the defendants Walsh administrators there is submitted for your consideration three questions
51 in each of these cases, to which you should return an answer "Yes" or "No" to each question in each case. The first question is

Did Homan J. Walsh ever qualify or act as director of the Capital National Bank?

The second question is

Did Homan J. Walsh ever sign any report of the condition of the Capital National Bank, mentioned in pleadings or shown in the evidence.

Third.

Is Homan J. Walsh shown by the evidence to have actively participated in the making of any report of the condition of the Capital National Bank mentioned in the pleadings or shown in the evidence?

26th. You are instructed that the second of said questions should be answered "No" since the court has already instructed you that there is no evidence that the said Walsh ever signed any of the reports of the condition of the Capital National Bank.

The first and third of said questions you will answer "Yes" or "No" according as you shall find from the consideration of the evidence upon either and both of said questions.

27th. When you shall have agreed upon your verdict your foreman should sign the four verdicts (one in each case) conformable to your findings, unless you should find in favor of the plaintiffs and against a part only of the defendants. On the other hand, if you should find in favor of the plaintiffs and against a part only of the defendants it will be necessary for you to insert in the blank left in the verdicts the full name of the defendants against whom you find.

You will also, as before instructed, make the special findings before referred to, and your foreman will sign the four special verdicts, and when you have agreed upon your verdict, and agreed upon the answer to the first and third questions of them special ver-
82 dict in each of these cases, you will return with the same into court.

S. H. SORNBORGER, *Judge.*

And afterwards on the 19th day of June, 1902, there was entered of record the following herein, to-wit:

BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

And now on this June 19, 1902, comes the Court, the above named jurors, the parties to this action, and their respective attorneys, pursuant to adjournment, and the trial proceeds.

And said jurors having heard all the testimony, the argument of counsel, the instructions of the Court, retired in charge of the Sheriff for deliberation, and on the same day returned into open court the following verdict in writing, and the following special findings in writing on special interrogatories requested on the part of the defendants.

THE STATE OF NEBRASKA, *Seward County, ss:*

May Term, A. D. 1902, to-wit, May 19, 1902.

BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

We, the jury in this case, being duly empaneled and sworn in this action, do find and say that we found for the plaintiff and against each and all of the defendants, and we assess the amount of the plaintiff's recovery against each and all of the said defendants at the sum of thirteen thousand five hundred and ten and 96/100 dollars, ($13510.96).

J. J. ENDICOTT, *Foreman.*

83 In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST
vs.
C. W. MOSHER ET AL.

The jury will answer *answer* the following questions to be signed by the foreman.

1. Did Homan J. Walsh ever qualify or act as a director of the Capital National Bank?

Answer. No.

J. J. ENDICOTT, *Foreman.*

2. Did Homan J. Walsh ever sign any report of the condition of the Capital National Bank mentioned in plaintiff's petition?
Ans. No.

J. J. ENDICOTT, *Foreman.*

3. Do you find from the evidence that Homan J. Walsh ever took part in the making and publishing of the reports or any report of the condition of the Capital National Bank?
Ans. Yes.

J. J. ENDICOTT, *Foreman.*

When a mistake has been made in writing a word in the findings, shall we draw a pen through the error in order to make the correction?
Answer. If you have mistakenly written a wrong or unintentional word in a finding it is proper for you to draw a pen through it & insert instead of it the word you desire to return as your answer.

S. H. SORNBORGER, *Judge.*

And on the same date the following requests to the Court was filed in the office of said Clerk, to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST
vs.
CHARLES W. MOSHER ET AL.

84 JONES NATIONAL NANK
vs.
CHARLES W. MOSHER ET AL.

UTICA BANK
vs.
CHARLES W. MOSHER ET AL.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Instructions Requested by Defendants Thompson, Yates, Hamer, and Walsh.

1. The jury are instructed that these actions were brought against C. W. Mosher, President of the Capital National Bank, and R. C. Outcalt, cashier of said bank, and against D. E. Thompson, Charles E. Yates, Ellis P. Hamer and R. O. Phillips as directors of said bank, and Homan J. Walsh as vice-president of said bank, the defendants Walsh, Hamer and Phillips have since died; and the estates of Hamer and Walsh are represented in these actions

by their administrators. No revivor of this action against R. O. Phillips has been had, and consequently you cannot find any verdict against Phillips.

2. All of the foregoing entitled cases are submitted to you for determination at one trial and on the same evidence, so far as such evidence is applicable to the respective cases and to the respective defendants. Each of the defendants makes a separate defense, and each defendant in each of the cases can only be bound or affected in any way by such evidence as may be applicable to him and to his conduct under the charges made in the respective petitions of each case.

3. The jury are instructed that the Capital National Bank was organized under the national banking Act, such act provided that no less than five persons from among the stockholders of such bank should be elected to act as directors of said bank.

As the act was originally passed such directors were required to manage and carry on the banking business in the bank of which they are directors, but under the law as amended in 1874, and as appears in Section 5136 of the National Banking Act, the directors of the Capital National Bank had the power to appoint a president and cashier to act as the officers and agents of said
85 bank, and authorized them to carry on the active management of the bank's business.

And you are instructed that the oath which the national bank director had been required to take under the Act as it first was drawn, to the effect that he would not knowingly violate, or willingly permit to be violated any of the provisions of the National Banking Act, was so changed by the amended Act of 1874, by inserting the words: "so far as the duties devolved on him."

Refused.

Excepted to by J. W. Deweese, Att'y for Walsh estate & the Def't directors. S. H. Sornborger, Judge.

4. The jury are further instructed that the National Banking Act under which the Capital National Bank was acting during the time alleged in the plaintiff's petitions, it was required to make not less than five reports for each year to the Comptroller of the Currency, and have the same published in a newspaper at the place where the bank was doing business, such report was required to be sworn to by the president or cashier of the bank and attested by at least three directors. The assets and liabilities of the bank were required to be listed under the proper heads and according to the form prescribed by the Comptroller, and you are instructed that the reports thus required to be made do not purport to give the value of the assets, nor certify to the solvency of the bank, or the makers of its paper, but simply set forth the resources and liabilities of the bank.

Refused.

Excepted to by J. W. Deweese, Att'y for Walsh Est. & the Def't directors. S. H. Sornborger, Judge.

5. The jury are instructed that reports of the assets and liabilities of the bank made to the Comptroller and published in a news-

paper are not an act of the officers and whole directors of the bank, but simply the act of such officers, who made and swore to the same, and such directors as attested such report; and any director who did not attest such report is not held responsible for anything
86 stated therein.

Refused.

Excepted to by J. W. Deweese, Att'y for Def'ts Walsh Estate & directors. S. H. Sornborger, Judge.

6. The jury are instructed that if you find from the evidence introduced in reference to any one of the directors named in any one of the said cases that such director did not knowingly violate any of the requirements of the National Banking Act under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant.

Refused.

Exception by J. W. Deweese for Walsh estate & the directors. S. H. Sornborger, Judge.

7. If the jury find that the defendant Mosher made a false credit to the account of the State Treasurer, and made other false entries and manipulations of accounts in the books of the bank and wrongfully issued certificates of deposit for his own interest and benefit without authority, without the knowledge or consent of the directors, which could not by ordinary care and attention in the usual course of the official duties of directors be discovered, then you are instructed that the directors would not be responsible, either collectively or individually for the fact of such false entries and manipulations of the bank's accounts.

If false entries and manipulations were had and done by defendant Mosher in the use of the books of the bank, that fact would not carry notice to the directors. It would be a mis-use of words and inconsistent with honest thought to say that because entries were made to conceal the real facts in the books, would bring notice to the directors.

False entries and manipulations of figures in the books
87 purposely kept in a manner to conceal the truth, do not either in law or morals, carry knowledge of such facts. If the defendant Mosher had knowledge of the truth, even though he was president of the bank, his knowledge of his own frauds perpetuated for his individual purposes could not be attributable to the directors of said bank.

Refused.

Excepted to by J. W. Deweese for Walsh Estate & Def't directors. S. H. Sornborger, Judge.

8. The jury are further instructed that the defendant Mosher, being president of the bank, like any — agent of a corporation, could bind the bank within the scope of his authority; but this principle of law has no application to a case where the president of the bank goes outside of his authority and acts for himself in his

own interest and adversely to the interest of the bank of which he is president.

If Mosher acted in fraudulent transaction- for his own interest and against the interest of the bank, such act is not within the operation of the rule that the principal for which he is agent is bound by his act; for two reasons:

First. In such a case he would be acting for the interest of himself and not for his principal, the bank;

And secondly, he would not communicate to his principal an act of fraud which he was interested in concealing; consequently, it is both unjust and unreasonable and contrary to law to say that the directors of the bank or the bank itself should be bound by such acts.

Refused.

Excepted to by Def't directors & Walsh estate, J. W. Deweese.
S. H. Sornborger, Judge.

9. The jury are instructed that if you find in these cases that the Comptroller of the Currency furnished printed blanks on which reports were to be made, and the blanks thus printed set forth certain headings and titles under which the assets of said bank were to
88 be listed; and you further find that the accounts in the bank's books were not kept under the same headings and titles printed in said blanks, and that consequently some of the items kept in the bank's books had to be reclassified in order to come under the proper headings as printed in the blanks for the making of said reports, then you are instructed that such reclassification of the assets and liabilities of the bank would not in itself make such report false, even if it did not literally agree with the amounts stated under the headings and totals as kept in the bank's books. In other words, if the accounts were reclassified in order to properly fit the headings of the blank report, this in itself was not the making of a false report. And when such report was called for, the person or persons making and attesting it entered under the headings and titles of the prescribed form, a true statement of the bank's assets and liabilities on the day called for, such report fulfilled the demands of the law, and would not be a false report.

Refused.

Excepted to by Def't Directors & Walsh Estate, J. W. Deweese.
S. H. Sornborger, Judge.

10. You are further instructed that a report is not necessarily false, even though it might state an account differently from what it appeared on the books of the bank. If you find that in — making of a report of the resources and liabilities of the bank, the resources were inflated and stated to be larger than they appear- on the bank's books, and the liabilities of the bank were also equally inflated above what they appeared on the bank's books, then you are instructed that such a statement is not material in such a sense as to affect the value or standing of the bank, for the reason that the liabilities of the bank are increased as much as the resources are increased; consequently the bank is in no better condition, and appear- to be in no better condition, when both sides are thus inflated, than

it was had there been no inflation on either side of the book's account.

89 Refused.

Excepted to by Def't directors & Walsh estate, J. W. Deweese. S. H. Sornborger, Judge.

11. The jury are instructed that if you find — one or more of the defendants named in each of said cases have been guilty of negligence, misconduct or fraud, charged in said petitions in the several cases, that fact would not affect any of the other defendants, nor make such other defendants, or any of them guilty of such negligence, misconduct and fraud.

In other words, although you may believe from the evidence that one of the defendants named had done and committed or neglected the things charged in the petitions in the different cases under the proof rendered, yet you are instructed that the negligence and misconduct and fraud of each defendant can be attributed to no one of the other defendants without proof that such other defendant, or defendants participated therein.

Refused.

Excepted to by Def't directors & Walsh estate, J. W. Deweese. S. H. Sornborger, Judge.

12. The jury are further instructed that proof that the president or cashier misappropriated or embezzled the funds of the bank, is not of itself sufficient to establish actionable negligence against directors who are not shown to have participated therein.

Refused.

Excepted to by Def't directors & Walsh estate. J. W. Deweese. S. H. Sornborger, Judge.

13. The jury are instructed that the law under which the said bank was organized and operated, provided for bank examiners to be appointed by the Comptroller of the Currency, whose duty it was to examine and make a full and detailed report of the condition of the bank to the Comptroller of the Currency, and the evidence shows in this case that such examinations of the bank were made

90 from time to time, by the regular government bank examiner, during the entire existence of the Capital National Bank.

Refused.

Excepted to by Def't directors & Walsh estate, J. W. Deweese. S. H. Sornborger, Judge.

14. The jury are instructed that the evidence in this case shows that the defendant Mosher was the real party in interest in the management and control of the Western Manufacturing Company; and if you believe from the evidence that he used notes of the Company in borrowing money, or in endorsing such notes as President of the bank for rediscount, for his own interest and without the knowledge, consent and authority of the Board of Directors of the bank, then you are instructed that the bank would not be liable on such notes.

Refused.

Excepted to by Def't directors & Walsh Estate, J. W. Deweese.
S. H. Sornborger, Judge.

The jury are instructed that if you find that any notes were issued by the Western Manufacturing Company and endorsed and negotiated by defendant Mosher as President of the Bank, then you are instructed that the bank would not be liable on any of such notes that were not duly and legally protested according to law; and the allowance of claims on such illegal notes by the Receiver of said bank is immaterial in the consideration of this case, and does not change the fact that the bank was not liable on the same.

Refused.

Excepted to by Def't Directors and Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

16. The jury are instructed that in each of the above entitled cases, the cause of action in each, so far as the published reports are concerned, is based upon the two reports set out in the petitions, to-wit: the report of December 28, 1886, and the report of December 9, 1892.

91

Refused.

Excepted to by Def't directors & Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

17. The jury are further instructed that if any liability ever existed against any of the defendants on account of the making and publishing of the report of December 28, 1886, such liability is barred by the statute of limitations, and no recovery can be had in this action on account thereof.

Refused.

Excepted to by def't directors and Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

18. The jury are instructed that in considering the various charges and allegations made against each defendant in the several cases submitted to you, you are not to arrive at any conclusion or determine any fact by mere conjecture or speculation; and you are further instructed that the burden of proof is upon the plaintiff to establish the facts alleged against any defendant in these several actions; and you must determine such facts from the evidence relating to such charges and facts, and not determine the same by inference, conjecture or guess-work.

Refused.

Excepted to by Def't Directors and Walsh Estate. S. H. Sornborgor, Judge.

19. The jury are instructed that Homan J. Walsh, who was vice-president of the said bank, never signed any of the reports to the Comptroller which were published in the newspapers; and you are therefore instructed to find a verdict in his favor, as he is not liable for anything stated in such reports.

Refused.

Excepted to by Defendant directors & Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

92 20. The jury are instructed that in considering the various charges and allegations made against each defendant in the several cases submitted to you, you are not — arrive at any conclusion or determine any fact by mere conjecture or speculation; and you are further instructed that the burden of proof is upon the plaintiff to establish the facts alleged against any defendant in these several actions; and you must determine such facts by the positive proof relating to such charges and facts, and not determine the same by inference, conjecture or guess-work.

Refused.

Excepted to by Def't Directors & Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

* * * * * * *

93 And afterwards on the same — the following request was filed herein, to-wit:

BANK OF STAPLEHURST
vs.
CHARLES W. MOSHER ET AL

1. The jury are instructed in this case that the defendants are not jointly liable to the plaintiff, and each defendant has made a separate defense to the claim made in the plaintiff's petition.

You are instructed that under the issues in this case and the evidence that has been adduced on the trial thereof, the plaintiff is not entitled to recover a verdict against the defendant Elizabeth Hamer, administratrix of the estate of Ellis P. Hamer, deceased; and you are therefore instructed to return a verdict in favor of the said defendant Elizabeth Hamer, administratrix of the estate of Ellis P. Hamer, deceased.

Refused.

Excepted to by Def't Hamer, Adm'x. J. W. D. S. H. Sornborger, Judge.

And afterwards there was filed herein on the same day, the following, to-wit:

THE BANK OF STAPLEHURST
vs.
CHARLES W. MOSHER ET AL.

1. The jury are instructed in this case that the defendants are not jointly liable to the plaintiff, and each defendant has made a separate defense to the claim made in the plaintiff's petition.

You are instructed that under the issues in this case and the evidence that has been adduced on the trial thereof, the plaintiff is not entitled to recover a verdict against the defendant
94–108 David E. Thompson; and you are therefore instructed to return a verdict in favor of the defendant David E. Thompson.

Refused.

Excepted to by Def't Thompson. J. W. D. S. H. Sornborger, Judge.

And afterwards, on the same day there was filed herein the following, to-wit:

THE BANK OF STAPLEHURST
vs.
CHARLES W. MOSHER ET AL.

1. The jury are instructed in this case that the defendants are not jointly liable to the plaintiff, and each defendant has made a separate defense to the claim made in the plaintiff's petition.

You are instructed that under the issues in this case and the evidence that has been adduced on the trial thereof, the plaintiff is not entitled to recover a verdict against the defendant Charles E. Yates; and you are therefore instructed to return a verdict in favor of the said defendant Charles E. Yates.

Refused.

Excepted to by Def't Yates. J. W. D. S. H. Sornborger, Judge.

* * * * * * *

109 And on the same day there was filed herein the following, to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST
vs.
CHARLES W. MOSHER ET AL.

Motion for a New Trial.

Now comes the defendant Louisa Hamer, adm'x of the estate of Ellis P. Hamer, deceased, and moves the court to set aside the verdict rendered by the jury against her in the above entitled cause and grant a new trial therein, for the following reasons:

1st. That cause of action had been duly and legally removed to the federal court, on account of the federal questions involved, as shown in the plaintiff's petition; and this court had no jurisdiction or power under the law to proceed further with the trial of said cause.

2nd. The court erred in the admission of any testimony over the objection of this defendant, for the reason that under the cause of action set forth in the plaintiff's petition, being one to recover damages on account of the negligence, misconduct and mismanagement of the bank on the part of this defendant the plaintiff is not, as a matter of law, entitled to recover.

3d. The damages alleged in the plaintiff's petition, if any existed on account of the charges made in said petition, could only be recovered by the receiver, and ratably distributed among the creditors and stockholders of said bank, and could not be recovered by the plaintiff for itself individually.

4th. The court erred in taking jurisdiction of said cause and the hearing of proof under the allegations of the plaintiff's petition over the objection of this defendant, for the reason that the duties and

liabilities of this defendant's intestate as a director of the Capital National Bank are governed and controlled by the National
110 Banking Act, under which said bank was organized, and for which this defendant's intestate was acting in the capacity of a director; and the damages growing out of the mismanagement, negligence or fraud of this defendant's intestate as charged in said petition, if the same existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the National banking act and the liabilities of said defendant's intestate under said act as a director of said bank.

5th. The petition in said cause does not state a cause of action against this defendant.

6th. For errors of law occurring at the trial and excepted to by this defendant.

7th. The verdict is contrary to law.

8th. The verdict is contrary to the evidence and is not supported by sufficient evidence.

9th. The court erred in refusing to give instruction numbered 1, requested by this defendant.

10th. The court erred in refusing to give instruction numbered 3, requested by this defendant.

11th. The court erred in refusing to give instruction numbered 4, requested by this defendant.

12th. The court erred in refusing to give instruction numbered 5, requested by this defendant.

13th. The court erred in refusing to give instruction numbered 6, requested by this defendant.

14th. The court erred in refusing to give instruction numbered 7, requested by this defendant.

15th. The court erred in refusing to give instruction numbered 8, requested by this defendant.

17th. The court erred in refusing to give instruction numbered 10, requested by this defendant.

18th. The court erred in refusing to give instruction numbered 11, requested by this defendant.

19th. The court erred in refusing to give instruction numbered 12, requested by this defendant.

111 20th. The court erred in refusing to give instruction numbered 13, requested by this defendant.

21st. The court erred in refusing to give instruction numbered 14, requested by this defendant.

22d. The court erred in refusing to give instruction numbered 15, requested by this defendant.

23d. The court erred in refusing to give instruction numbered 16, requested by this defendant.

24th. The court erred in refusing to give instruction numbered 17, requested by this defendant.

25th. The court erred in refusing to give instruction numbered 18, requested by this defendant.

26th. The court erred in refusing to give instruction numbered 19, requested by this defendant.

27th. The court erred in refusing to give instruction numbered 20, requested by this defendant.

28th. The court erred in giving the third instruction on its own motion, to the jury, numbered 3.

29th. The court erred in giving the second fourth instruction on its own motion, to the jury, numbered 4.

30th. The court erred in giving the fifth instruction on its own motion, to the jury, numbered 5.

31st. The court erred in giving the sixth instruction on its own motion, to the jury, numbered 6.

32d. The court erred in giving the seventh instruction on its own motion, to the jury, numbered 7.

33d. The court erred in giving the eighth instruction on its own motion, to the jury, numbered 8.

34th. The court erred in giving the ninth instruction on its own motion, to the jury, numbered 9.

35th. The court erred in giving the tenth instruction on its own motion, to the jury, numbered 10.

36th. The court erred in giving the eleventh instruction on its own motion, to the jury, numbered 11.

37th. The court erred in giving the twelfth instruction on
112 its own motion, to the jury, numbered 12.

38th. The court erred in giving the thirteenth instruction on its own motion, to the jury, numbered 13.

39th. The court erred in giving the fourteenth instruction on its own motion, to the jury, numbered 14.

40th. The court erred in giving the fifteenth instruction on its own motion, to the jury, numbered 15.

41st. The court erred in giving the sixteenth instruction on its own motion, to the jury, numbered 16.

42d. The court erred in giving the seventeenth instruction on its own motion, to the jury, numbered 17.

43d. The court erred in giving the eighteenth instruction on its own motion, to the jury, numbered 18.

44th. The court erred in giving the nineteenth instruction on its own motion, to the jury, numbered 19.

45th. The court erred in giving the twentieth instruction on its own motion, to the jury, numbered 20.

46th. The court erred in giving the twenty-first instruction on its own motion, to the jury, numbered 21.

47th. The court erred in giving the first instruction requested by plaintiffs, numbered 1st.

48th. The court erred in giving the second instruction requested by plaintiff, numbered 2d.

J. W. DEWEESE,
Att'y for Def't Louisa Hamer, Administratrix.

And afterwards, on the same day there was filed herein the following, to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST
vs.
CHARLES W. MOSHER ET AL.

Motion for a New Trial.

Now comes the defendant Charles E. Yates and moves the court to set aside the verdict rendered by the jury against him in the above entitled cause, and grant a new trial therein, for the following
113 reasons:

1st. That said cause of action had been duly and legally removed to the federal court, on account of the federal questions involved, as shown in the plaintiff's petition; and this court had no jurisdiction or power under the law to proceed further with the trial of said cause.

2nd. The court erred in the admission of any testimony over the objection of this defendant, for the reason that under the cause of action set forth in the plaintiff's petition, being one to recover damages on account of the negligence, misconduct and mismanagement of the bank on the part of this defendant the plaintiff is not, as a matter of law, entitled to recover.

3d. The damages alleged in the plaintiff's petition, if any existed on account of the charges made in said petition, could only be recovered by the bank or by the receiver, and ratably distributed among all the creditors and stockholders of said bank, and could not be recovered by the plaintiff for himself individually.

4th. The court erred in taking jurisdiction of said cause and hearing of proof under the allegations of the plaintiff's petition over the objections of this defendant, for the reason that the duties and liabilities of this defendant as a director of the Capital National Bank are governed and controlled by the national banking act, under which said bank was organized, and for which this defendant was acting in the capacity of a director; and the damages growing out of the mismanagement, negligence or fraud of this defendant as charged in said petition, if the same existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the national banking act and the liabilities of said defendant under said act as a director of said bank.

5th. The petition in said cause does not state a cause of action against this defendant.

6th. For errors of law occurring at the trial and excepted to by this defendant.

114 7th. The verdict is contrary to law.

8th. The verdict is contrary to the evidence and is not supported by sufficient evidence.

9th. The court erred in refusing to give instruction numbered 1, requested by this defendant.

10th. The court erred in refusing to give instruction numbered 3, requested by this defendant.

11th. The court erred in refusing to give instruction numbered 4, requested by this defendant.

12th. The court erred in refusing to give instruction numbered 5, requested by this defendant.

13th. The court erred in refusing to give instruction numbered 6, requested by this defendant.

14th. The court erred in refusing to give instruction numbered 7, requested by this defendant.

15th. The court erred in refusing to give instruction numbered 8, requested by this defendant.

16th. The court erred in refusing to give instruction numbered 9, requested by this defendant.

17th. The court erred in refusing to give instruction numbered 10, requested by this defendant.

18th. The court erred in refusing to give instruction numbered 11, requested by this defendant.

19th. The court erred in refusing to give instruction numbered 12, requested by this defendant.

20th. The court erred in refusing to give instruction numbered 13, requested by this defendant.

21st. The court erred in refusing to give instruction numbered 14, requested by this defendant.

22d. The court erred in refusing to give instruction numbered 15, requested by this defendant.

23d. The court erred in refusing to give instruction numbered 16, requested by this defendant.

24th. The court erred in refusing to give instruction numbered 17, requested by this defendant.

115 25th. The court erred in refusing to give instruction numbered 18, requested by this defendant.

26th. The court erred in refusing to give instruction numbered 19, requested by this defendant.

27th. The court erred in refusing to give instruction numbered 20, requested by this defendant.

28th. The court erred in giving the third instruction on its own motion, to the jury, numbered 3.

29th. The court erred in giving the second fourth intruction on its own motion, to the jury, numbered 4.

30th. The court erred in giving the fifth instruction on its own motion, to the jury, numbered 5.

31st. The court erred in giving the sixth instruction on its own motion to the jury, numbered 6.

32d. The court erred in giving the seventh instruction on its own motion, to the jury, numbered 7.

33d. The court erred in giving the eighth instruction on its own motion, to the jury, numbered 8.

34th. The court erred in giving the ninth instruction on its own motion, to the jury, numbered 9.

35th. The court erred in giving the tenth instruction on its own motion, to the jury, numbered 10.

36th. The court erred in giving the eleventh instruction on its own motion, to the jury, numbered 11.

37th. The court erred in giving the twelfth instruction on its own motion, to the jury, numbered 12.

38th. The court erred in giving the thirteenth instruction on its own motion, to the jury, numbered 13.

39th. The court erred in giving the fourteenth instruction on its own motion, to the jury, numbered 14.

40th. The court erred in giving the fifteenth instruction on its own motion, to the jury, numbered 15.

41st. The court erred in giving the sixteenth instruction on its own motion, to the jury, numbered 16.

116 42d. The court erred in giving the seventeenth instruction on its own motion, to the jury, numbered 17.

43d. The court erred in giving the eighteenth instruction on its own motion, to the jury, numbered 18.

44th. The court erred in giving the nineteenth instruction on its own motion, to the jury, numbered 19.

45th. The court erred in giving the twentieth instruction on its own motion, to the jury, numbered 20.

46th. The court erred in giving the twenty-first instruction on its own motion, to the jury, numbered 21.

47th. The court erred in giving the 1st instruction requested by plaintiff, numbered 1st.

48th. The court erred in giving the 2nd instruction requested by plaintiff, numbered 2nd.

J. W. DEWEESE,
Att'y for Def't Yates.

And on the same day there was filed herein the following motion, to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST
vs.
CHARLES W. MOSHER ET AL.

Motion for a New Trial.

Now comes the defendant David E. Thompson and moves the court to set aside the verdict rendered by the jury against him in the above entitled cause and grant a new trial therein, for the following reasons:

1st. That said cause of action had been duly and legally removed to the federal court, on account of the federal questions involved, as shown in the plaintiff's petition; and this court had no jurisdiction or power under the law to proceed further with the trial of said cause.

2nd. The court erred in the admission of any testimony over the objection of this defendant, for the reason that under the cause of

action set forth in the plaintiff's petition, being one to recover
117 damages on account of the negligence, misconduct and mismanagement of the bank on the part of this defendant as director the plaintiff is not, as a matter of law, entitled to recover.

3d. The damages alleged in the plaintiff's petition, if any existed on account of the charges made in said petition, could only be recovered by the bank or by the receiver, and ratably distributed among all the creditors and stockholders of said bank, and could not be recovered by the plaintiff for itself individually.

4th. The court erred in taking jurisdiction of said cause and the hearing of proof under the allegations of the plaintiff's petition over the objection of this defendant, for the reason that the duties and liabilities of this defendant as a director of the Capital National Bank are governed and controlled by the national banking act, under which said bank was organized, and for which this defendant was acting in the capacity of director; and the damages growing out of the mismanagement, negligence or fraud of this defendant as charged in said petition, if the same existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the national banking act and the liabilities of said defendant under said act as a director of said bank.

5th. The petition in said cause does not state a cause of action against this defendant.

6th. For errors of law occuring at the trial and excepted to by this defendant

7th. The verdict is contrary to law.

8th. The verdict is contrary to the evidence and is not supported by sufficient evidence.

9th. The court erred in refusing to give instruction numbered 1, requested by this defendant.

10th. The court erred in refusing to give instruction numbered 3, requested by this defendant.

11th. The court erred in refusing to give instruction numbered 4, requested by this defendant.

12th. The court erred in refusing to give instruction num-
118 bered 5, requested by this defendant.

13th. The court erred in refusing to give instruction numbered 6, requested by this defendant.

14th. The court erred in refusing to give instruction numbered 7, requested by this defendant.

15th. The court erred in refusing to give instruction numbered 8, requested by this defendant.

16th. The court erred in refusing to give instruction numbered 9, requested by this defendant.

17th. The court erred in refusing to give instruction numbered 10, requested by this defendant.

18th. The court erred in refusing to give instruction numbered 11, requested by this defendant.

19th. The court erred in refusing to give instruction numbered 12, requested by this defendant.

20th. The court erred in refusing to give instruction numbered 13, requested by this defendant.

21st. The court erred in refusing to give instruction numbered 14, requested by this defendant.

22d. The court erred in refusing to give instruction numbered 15, requested by this defendant.

23d. The court erred in refusing to give instruction numbered 16, requested by this defendant.

24th. The court erred in refusing to give instruction numbered 17, requested by this defendant.

25th. The court erred in refusing to give instruction numbered 18, requested by this defendant.

26th. The court erred in refusing to give instruction numbered 19, requested by this defendant.

27th. The court erred in refusing to give instruction numbered 20, requested by this defendant.

28th. The court erred in giving the third instruction on its own motion, to the jury, numbered 3.

29th. The court erred in giving the second fourth instruc-
119 tion on its own motion, to the jury, numbered 4.

30th. The court erred in giving the fifth instruction on its own motion, to the jury, numbered 5.

31st. The court erred in giving the sixth instruction on its own motion, to the jury, numbered 6.

32d. The court erred in giving the seventh instruction on its own motion, to the jury, numbered 7.

33d. The court erred in giving the eighth instruction on its own motion, to the jury, numbered 8.

34th. The court erred in giving the ninth instruction on its own motion, to the jury, numbered 9.

35th. The Court erred in giving the tenth instruction, on its own motion, to the jury, numbered 10.

36th. The court erred in giving the eleventh instruction on its own motion, to the jury, numbered 11.

37th. The court erred in giving the twelfth instruction on its own motion, to the jury, numbered 12.

38th. The court erred in giving the thirteenth instruction on its own motion, to the jury, numbered 13.

39th. The court erred in giving the fourteenth instruction on its own motion, to the jury, numbered 14.

40th. The court erred in giving the fifteenth instruction on its own motion, to the jury, numbered 15.

41st. The court erred in giving the sixteenth instruction on its own motion, to the jury, numbered 16.

42d. The court erred in giving the seventeenth instruction on its own motion to the jury, numbered 17.

43d. The court erred in giving the eighteenth instruction on its own motion, to the jury, numbered 18.

44th. The court erred in giving the nineteenth instruction on its own motion, to the jury, numbered 19.

45th. The court erred in giving the twentieth instruction on its own motion, to the jury, numbered 20.

47th. The court erred in giving the first paragraph of instructions requested by plaintiffs, numbered 1st.

120 48th. The court erred in giving the second instruction, requested by plaintiffs, numbered 2d.

H. F. ROSE AND
J. W. DEWEESE,
Att'ys for Def't Thompson.

* * * * * * *

121 And afterwards, on the 21st day of July, A. D., 1902, there was had herein the following order of court, to-wit:

In the District Court of Seward County, Nebraska.

No. 1792.

THE BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Be it remembered, that on this 21st day of July, A. D., 1902, it being a day of the regular May 1902 term of the District Court, this cause came on for hearing on the motion of the defendants George W. Walsh and Warren W. Walsh, as administrators of the estate of Homan J. Walsh, deceased, for judgment in their favor on the special findings of the jury, notwithstanding the general verdict of the jury against them. And the court being fully advised in the premises sustains said motion to which the plaintiff excepts.

And thereupon and on said same day this cause came on further to be heard on the separate motions for new trial of defendants, David E. Thompson, Charles E. Yates, Charles W. Mosher, Richard C. Outcalt and Louisa Hamer, as executrix of the last will and testament of Ellis P. Hamer, deceased, and the same being argued and submitted to the court, and the court being fully advised in the premises, on consideration thereof does overrule each and all of said defendants' motions for new trial, to which said defendants severally except. It is therefore considered and adjudged by the court that the defendants George M. Walsh and Warren W. Walsh as administrators of the estate of Homan J. Walsh, deceased, go hence without day.

It is therefore considered and adjudged that said defendants Walsh, as administrators, &c. recover judgment against plff. for his costs.

It is further considered and adjudged that the plaintiff recover from the defendants David E. Thompson, Charles E. Yates, Charles W. Mosher, Richard C. Outcalt, and Louisa Hamer as executrix of the last will and testament of Ellis P. Hamer, deceased, and each of them, jointly and severally the sum of $13,510.96 with 7% interest from this date, and costs herein taxed at $——.

Defendants are allowed forty days from the rising of
122 the court in which to settle bill of exceptions.

It is further ordered that no execution issue on this judgment until after sixty days from this date.

And afterwards, on Aug. 4., 1902, the following motion was made herein, to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST
vs.
C. W. MOSHER ET AL.

Now comes the defendants and move the court to correct the verdict rendered in the above entitled cause, and to correct the judgment rendered therein, so far as the same relates to the amount of recovery, and in this case to correct the judgment so that the amount of the judgment with interest to April 21, 1902, will be the sum of $11,287.21 for the reasons:

1st. The amount of the verdict was not determined by the jury but was simply furnished to the jury by the plaintiff's counsel and the court, subject to be corrected afterward, according to the fact, if the same was wrong, as set forth in the affidavit hereto attached and made part hereof.

J. W. DEWEESE &
H. F. ROSE,
Att'ys for Def'ts Thompson, Yates, and Hamer.

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST
vs.
C. W. MOSHER ET AL.

STATE OF NEBRASKA, *Lancaster County, ss:*

H. F. Rose and J. W. Deweese being duly sworn, say that they were attorneys for the defendants in the above entitled cause. That counsel for the plaintiff asked the court to instruct the jury that if they found for the plaintiff to return a verdict in favor
123 of the plaintiff for the amount which the plaintiff had figured up as the correct amount in case the jury decided for the plaintiff. As the correct figuring of the amount of this verdict on which judgment should be rendered, involved a good deal of work and time, it was announced in open court by the court in the presence of the jury and to the attorneys on both sides of the controversy, that he himself would write in the amount which the plaintiff had furnished as the correct amount, into the verdict for the jury to return in case they found for the plaintiff, and that

such amount could be corrected or changed later if it was incorrect, and after the defendants had had time and opportunity to figure over the claims, with interest, and the credits to be deducted, and determined whether the amounts so furnished by the plaintiff's counsel to the court was correct or not.

Affiants further say that they have had no sufficient time to make the proper figuring of the amount that should be entered into the verdict; but that they have had the claims with credits and interest, carefully and properly figured since, and find that the amount entered in the verdict in this case is incorrect and excessive, and that judgment was entered by the court on July 21, 1902 on the verdict rendered for $13,510.96, whereas the true amount that the plaintiff would be entitled to recover, if at all, with interest at 7%, was and is the sum of $11287.21.

H. F. ROSE.
J. W. DEWEESE.

Sworn to before me and subscribed to in my presence by J. W. Deweese & H. F. Rose this Aug. 2, 1902.

[SEAL.] WM. B. KERBY,
Notary Public.

And afterwards, on September 24th, 1902, there was filed with the clerk of said court, bill of exceptions herein, consisting of Vol. I, Vol. II, Vol. III, the same being herewith transmitted.

And afterwards, on the 22nd day of October, being a day in the regular May, 1902 term of said District Court, the following order of court was had herein, to-wit:

124 In the District Court of Seward County, Nebraska.

JONES NATIONAL BANK
v.
MOSHER ET AL.

STAPLEHURST BANK
v.
MOSHER & Others.

UTICA BANK
v.
MOSHER & Others.

BAILEY
v.
MOSHER & Others.

Order for Remittitur.

It having been made to appear by computations that the verdicts heretofore found by the jury in the above several cases was & are

each excessive, and that the true sums due upon each several claim, with interest were severally as follows:—

To the	Jones National Bank	$16,444.63
" "	Staplehurst Bank	13,163.54
" "	Utica Bank	8,111.29
" "	Thomas Bailey	9,682.37

And counsel for all the parties in said causes having agreed that the foregoing are true computations, severally, and should be substituted, in the place of the sums ascertained by the jury & included in the several verdicts, Now therefore,

It is ordered that plaintiffs may and they are hereby ordered to file a remittitur in each of said several cases, of the difference between the amount, severally, above stated and the amount named in the verdict, and that thereupon the clerk may enter judgment, in pursuance of the verdict, in each of said cases for the amount- above severally set forth.

S. H. SORNBORGER, *Judge.*

There was also entered of record of the same day the following Journal Entry, to-wit:

In the District Court of Seward County, Nebraska.

No. 1792.

THE BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

125 & 126 Be it remembered that on this 22nd day of October, 1902, being a day in the regular May 1902 term of the District Court this cause came on for hearing on the motion of David E. Thompson, Charles E. Yates and Louisa Hamer as executrix of the last will and testament of Ellis P. Hamer, deceased, to correct and amend the judgment heretofore entered in this cause.

And it appearing to the court that the amount of the verdict and judgment in this cause is excessive, and that the amount thereof should be reduced from $13,510.96 to $13,163.54 and the plaintiff appearing in open court and consenting to said remittitur,

It is therefore ordered and adjudged that the amount of said judgment be and is hereby reduced to $13,163.54 and that as thus modified the said judgment be and is hereby affirmed, and execution is awarded therefor.

And afterwards, on November 13th, 1902, there was filed herein a certain Remittitur, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Remittitur.

The verdict in this cause for the sum of $13,510.96 as returned by the jury, being excessive in the sum of $347.42, and the plaintiff having been ordered and permitted by the court to enter remittitur in that amount,

The plaintiff therefore hereby remits from the verdict as returned by the jury in the sum of $347.42, so that the verdict in its favor may be reduced to the sum of $13163.54, in accordance with the order of the court.

THE BANK OF STAPLEHURST,
By R. S. NORVAL,
J. J. THOMAS, *Its Att'ys.*

* * * * * * *

127 &128 Endorsed: No. 13033. Charles E. Yates, *et al. vs.* Bank of Staplehurst. Transcript. Supreme Court of Nebraska, Filed Nov. 28 1902 Lee Herdman, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bill of Exceptions, which by stipulation of the parties and order of the Court was made a part of the transcript of the proceedings had and done in the District Court of Seward County in each of the following cases: Yates *v.* Jones Nat. Bank, No. 13030, Yates *v.* Utica Bank, No. 13031, Yates *v.* Bailey, No. 13032, Yates *v.* Bank of Staplehurst, No. 13033, and duly certified to said Supreme Court of Nebraska. A copy of said Bill of Exceptions, duly certified, is contained in volumes —, —, and —, from pages — to —.

* * * * * * *

129 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Motion in words and figures following, to-wit:

In the Supreme Court, State of Nebraska.

CHARLES E. YATES and LOUISA HAMER, Administratrix, Plaintiffs in Error,

vs.

UTICA BANK and THOMAS BAILEY, Defendants in Error,

and

DAVID E. THOMPSON, Plaintiff in Error,

vs.

BANK OF STAPLEHURST and THE JONES NATIONAL BANK, Defendants in Error.

Now comes the plaintiffs in error in each of the above cases and moves the court to make an order on the Clerk of this court directing said clerk to file the bill of exceptions in said cases con-
130 sisting of three volumes, not only in the above entitled cases but also in the cases as follows:

Charles E. Yates *vs.* Jones National Bank, Charles E. Yates *vs.* The Bank of Staplehurst, Charles E. Yates *vs.* Thomas Bailey, Louisa Hamer, administratrix *vs.* Thomas Bailey, Louisa Hamer, administratrix *vs.* The Jones National Bank, Louisa Hamer, administratrix *vs.* Utica Bank, David E. Thompson *vs.* Bank of Staplehurst, David E. Thompson *vs.* Jones National Bank, for the reason that all of said cases were tried at one time, before the same court, and the same jury, on the same evidence as shown in the bill of exceptions by direction of the trial court and in accordance with the stipulation of the parties to said cases, as follows:

In the District Court — Seward County, Nebraska.

THE BANK OF STAPLEHURST, Plaintiff,

vs.

CHARLES W. MOSHER ET AL., Defendants.

THE JONES NATIONAL BANK, Plaintiff,

vs.

CHARLES W. MOSHER ET AL., Defendants.

UTICA BANK, Plaintiff,

vs.

CHARLES W. MOSHER ET AL., Defendants.

THOMAS BAILEY

vs.

CHARLES W. MOSHER ET AL.

Stipulation.

The parties to this stipulation in each of the above entitled causes which are now pending in the District Court of Seward County, Nebraska, hereby stipulate and agree that all

of said causes shall be tried in the District Court at one and the same time, and that the evidence proper and applicable to any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, subject of course to the objections of either of the parties to this stipulation and governed by the ruling of the court, shall be offered and produced and the cases respectively disposed of by court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence
131 insofar as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation, shall be considered by the jury in such case in the disposition thereof; such evidence being properly applied to any one or to all of the parties to this stipulation as the facts of the *court* may warrant.

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in such case may be received and that then the whole evidence as thus introduced shall be properly applied to each respective case and to each respective party thereto under the rulings and directions of the court, subject to the objections of either party.

It is therefore agreed that if either party or any party to any of said causes represented in the stipulation shall desire to prosecute error from the judgment of the District Court in any or in all of said cases, a transcript of the testimony given on the trial of all of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one Bill of Exceptions and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases, and that the bill of exceptions settled in one case shall be the bill of exceptions in each and all of said cases.

In Witness Whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,
J. J. THOMAS,
Attorneys for Plaintiffs.
H. F. ROSE AND
J. W. DEWEESE,
Attorneys for D. E. Thompson.
J. W. DEWEESE,
Att'y for Def'ts Yates, Walsh Estate, & Hamer Estate.
132 CHAS. O. WHEDON,
Attorney for Chas. W. Mosher and R. C. Outcalt.

H. F. ROSE &
J. W. DEWEESE,
Att'ys for Pl'ff in Error.

Endorsed: C. E. Yates Pl'ff in Error *vs.* Utica Bank, *et al.*, 13030 13031–32 & 33. Charles E. Yates, *et al.*, *vs.* Jones Nat. Bank *et al.* Motion *in re* Bill of Exceptions. Supreme Court of Nebraska. Filed Nov. 28 1902. Lee Herdman Clerk.

And afterward, to-wit, on the 2nd day of December, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Order in words and figures following, to-wit:

No. 13030.

CHARLES E. YATES, LOUISA HAMER. Administratrix, and DAVID E. THOMPSON, Plaintiffs in Error,

v.

THE JONES NATIONAL BANK, Defendant in Error.

No. 13031.

CHARLES E. YATES, LOUISA HAMER, Administratrix, ET AL., Plaintiffs in Error,

v.

UTICA BANK, Defendant in Error.

No. 13032.

CHARLES E. YATES, LOUISA HAMER, Administratrix, ET AL., Plaintiffs in Error,

v.

THOMAS BAILEY, Defendant in Error.

No. 13033.

CHARLES E. YATES, LOUISA HAMER, Administratrix, and DAVID E. THOMPSON, Plaintiffs in Error,

v.

THE BANK OF STAPLEHURST, Defendant in Error.

133–189 Now on this 2nd day of December, 1902, the motion filed by the several plaintiffs in error in each one of the above entitled causes of action, came on for hearing, and on due consideration the Court sustains the said motion in each of the causes.

It is, therefore, ordered and adjudged that the Clerk be ordered and is hereby directed to file the one bill of exceptions resulting from the trial of said several causes in each of said several causes to be for the use and benefit of each of the said several plaintiffs in error as the original bill of exceptions in each one of said causes.

It is further ordered that the stipulation made by and between the parties to the said several suits for the trial of said several causes at one time before one jury and for the use of one bill of exceptions if either party desired to have the judgment of the lower court reviewed, shall be and is hereby ordered to be considered as a part of the bill of exceptions, although it is attached in fact to the Clerk's transcript

of the record, in the disposition of the said several causes, shall be used and considered a part of the bill of exceptions.

* * * * * * *

190 And afterwards, to-wit, on the 17th day of November, 1903, the following among other proceedings were had and done in said Supreme Court, to-wit:

The following causes were argued and submitted.
No. 13033. Yates *v.* Bank of Staplehurst. Error to Seward County.

And afterwards, to-wit, on the 17th day of March, 1904, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Order in words and figures following, to-wit:

No. 13033.

CHARLES E. YATES ET AL., Plaintiffs in Error,
v.
BANK OF STAPLEHURST ET AL., Defendants in Error.

Error to the District Court of Seward County.

Upon motion of the court, it is ordered that this cause be set for further oral argument of counsel April 19, 1904.

And afterwards, to-wit, on the 19th day of April, 1904, the following among other proceedings were had and done, to-wit:

The following causes were argued and submitted to the Court.
No. 13033, Yates *v.* Bank of Staplehurst, Error to Seward County.

And afterwards, on the 19th day of October, 1905, there was rendered by said Supreme Court and entered of record upon the journal thereof a certain Judgment in the words and figures following, to-wit:

191 No. 13033.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
BANK OF STAPLEHURST, Defendant in Error.

Error to the District Court of Seward County.

This cause coming on to be heard upon proceedings in error to the district court of Seward County, was argued by counsel and submitted to the court; upon full consideration whereof, the court doth find no error apparent in the record of the proceedings and judgment of said district court, and it is therefore considered, ordered

and adjudged that the judgment of said district court be, and the same hereby is affirmed; that defendant in error pay all costs incurred herein by him taxed at $—, and have and recover from plaintiffs in error all his costs so expended herein; that plaintiffs in error pay all costs incurred herein by them, taxed at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

And on the same day there was filed in the office of the Clerk of the said Supreme Court a certain Opinion, by said Court, pursuant to which the preceding judgment was rendered, which Opinion is in the words and figures following, to-wit:

192

No. 13030.

YATES
v.
JONES NATIONAL BANK.

No. 13031.

YATES
v.
THE UTICA BANK.

No. 13032.

YATES
v.
BAILEY.

No. 13033.

YATES
v.
THE BANK OF STAPLEHURST.

Opinion.

Filed October 19, 1905.

Commissioner's Opinion, Department No. 2.

1. Damages resulting to a national bank, from the misfeasance or mismanagement of its officers, are assets of the bank and are recoverable only in an action brought by the bank or for the benefit of all the stockholders and creditors thereof.
2. The officers of a national bank are personally liable for false reports made and published by them, in pursuance of Sec. 5211, Rev. Stat. U. S., to the party injured thereby and the right of the injured party to maintain the action does not rest on the federal statute but the common law.

3. It is no defense to an action of that character that such reports were made and published by the officers without knowledge of their falsity. Following Gerner *v.* Mosher, 58 Nebr., 135.
4. A cause of action, once finally determined between the parties on the merits, can not afterward, so long as such judgment remains in force, be litigated by new proceedings, either before the same or some other tribunal.
5. The foregoing rule applies, not only to judgments which are the result of a trial of issues of fact, but also to judgments on demurrer, where such judgments go to the merits of
193 the case; but a judgment on a demurrer, which is based on a technical defect of pleading, a lack of jurisdiction, or the like, does not involve the merits of the controversy, and will not support the plea of *res judicata*.
6. The voluntary dismissal of an action, before final submission, does not operate as an estoppel, and is without prejudice to a future action.
7. Under our practice the common law rule, making the payment of costs in the action dismissed a prerequisite to the prosecution of another, is one which the trial court in the exercise of a sound discretion may or may not apply.
8. Evidence examined, and held sufficient to sustain the findings of the jury.

194 ALBERT, *C.*:

In 1893, the Jones National Bank and the Bank of Staplehurst each brought an action against Charles W. Mosher, Homer E. Walsh, David E. Thompson, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt and Rollo O. Phillips; and Thomas Bailey and the Utica Bank, each brought an action against all of the said defendants except David E. Thompson. The actions were brought in the district court of Lancaster county, and the several petitions so far as the present inquiry is concerned are substantially the same, and the allegations are, in effect, as follows: That from the 9th day of December, 1886, to the 21st day of January, 1893, the Capital National Bank, of Lincoln, was a corporation duly organized, existing under and by virtue of the banking laws of the United States, that the defendants were the directors and officers thereof, and, as such, had exclusive control and management of its affairs. That during the whole of said period the Bank was insolvent, as the defendants well knew, or, by the exercise of due diligence would have known, and, that on or about the 23rd day of January, 1893, it passed into the hands of a receiver, who, at the commencement of the action, was in the possession of all of its assets. That from the 9th day of December, 1886, to the date such bank passed into the hands of the receiver, the defendants, in pursuance of the banking laws of the United States and on the demand of the comptroller of the currency, from time to time made statements, and caused and permitted statements to be made, to the comptroller of the currency purporting to show the financial condition of such bank at the time such statements were respectively

made, and caused such statements to be published in certain newspapers of general circulation in this state. That the defend-
195 ants, although chargeable with knowledge of the true condition of said bank, and that it was not in a prosperous condition, but insolvent when such reports were respectively made, for the purpose of deceiving the plaintiff and others and thereby inducing them to deposit their money in said bank, made out and caused said statements to be made in such a way as to show that the bank was in a prosperous condition and that it was safe and solvent. That such statements were brought to the notice of the plaintiff, and, that relying thereon and believing them to be true, the plaintiff, induced thereby, made certain deposits in the said bank before it passed into the hands of the receiver. That if each of the defendants did not have actual knowledge of the false and fraudulent character of such statements, and of the actual condition of the bank when such statements were made, his lack of knowledge was the result of his gross negligence in respect to his duties as an officer of the bank. Then follow allegations to the effect that the defendants, as officers of such bank, had loaned sums of money and had allowed and paid dividends to its stockholders while the bank was insolvent, contrary to and in violation of the banking laws of the United States. The concluding allegations are as follows:

"* * * and by reason of the several violations of the banking law as above set forth by these several defendants they have become and are liable to the plaintiff for the damages he has sustained by reason of their acts in the sum of $11,500, together with interest thereon from the 11th day of October to the 28th day of December, 1892, at the rate of seven per cent. per annum."

In each case the defendants demurred on four grounds: (1) Want of jurisdiction of subject matter. (2) Plaintiff's want of legal capacity to sue. (3) Defect of parties plaintiff. (4) Insufficiency of the facts stated to constitute a cause of action.
196 The defendants also filed petitions, asking the removal of the causes to the federal court, for the reason that the actions involved a construction of the National Banking Act. The causes, were removed, and thereupon the plaintiff filed motions in the federal court, asking that the causes be remanded, for the reason that they involved no federal question. The motion was overruled.

In the action brought by the plaintiff Bailey the federal court sustained the demurrer to his petition and dismissed the case. Bailey prosecuted error to the Circuit Court of Appeals, when the rulings of the lower court on the motion to remand and the demurrer to the petition were sustained, and the judgment of dismissal was affirmed (Bailey *v.* Mosher, 63 Fed., 488) whereupon the other plaintiffs dismissed their actions.

Thereafter, the plaintiffs each brought an action against the parties they had respectively made defendants before, in the district court of Seward county. The petitions, in the latter cases, as they stood at the time of the trial, are substantially the same as those in the former, save that it is not alleged in

the latter that the Capital National Bank was organized under the laws of the United States, nor that the statements therein mentioned, purporting to show the financial condition of said bank, was made in pursuance of the banking laws of the United States or on the demand of or to the comptroller of the currency. The concluding of the latter petitions *are* as follows:

"Plaintiff states that by reason of the facts as above set forth and the false and fraudulent statements, advertisements, and representations of the defendants the plaintiff has been damaged in the sum of Twenty Thousand ($20,000) Dollars."

On the application of the defendants, the case of Bailey *v.* Mosher, *et al.* was removed to the U. S. Circuit Court, on the
197 theory that it was brought under the United States Banking Act for misfeasance or mismanagement of the defendants, as officers of a national bank. On motion of the plaintiff, the Circuit court remanded the cause to the state court, holding that no federal question was involved. Bailey *v.* Mosher, *et al.*, 74 Fed., 15.

When the cause again reached the state court, the several petitions were amended by interlineation, whereby they were brought to their present form. Whereupon on application of the defendants, the cases were removed to the U. S. Circuit Court, on the theory that the amendment had injected a federal question. The Circuit Court overruled a motion to remand, sustained a demurrer to the petition and dismissed the cause. Bailey *v.* Mosher, *et al.*, 95 Fed., 223. On appeal, the question was presented to the Circuit Court of Appeals, the judgment of the Circuit Court was reversed and the causes remanded to the state court, for the reason that they involved no federal question. Jones *v.* Mosher, *et al.*, 107 Fed., 561.

The subsequent pleadings are somewhat voluminous, and it will suffice to say that the questions hereinafter discussed are sufficiently presented. The defendant Stuart made default and judgment was taken against him. The defendants Hamer and Phillips died after the action was commenced; as to the former the action was revived against his estate; as to the latter no proceedings for revivor were had.

The cases were all tried at the same time and submitted on the same evidence. At the close of the evidence the court directed a verdict in each case in favor of the defendant Walsh. As to the other defendants, in the several cases, to which they were respectively parties, the jury found for the plaintiff and judgment was given accordingly, from which the defendants respectively prosecute
198 error to this court. One of the principal contentions of the defendant- reduced to its simplest form, is as follows: (1) Damages resulting to a national bank, from the misfeasance or mismanagement of its officers are assets of the bank, and are recoverable of such officers, only in an action brought by the bank, or for the benefit of all of the stockholders and creditors. (2) The damages alleged in the petition resulted to a national bank from the misfeasance and mismanagement of its officers. (3) Therefore, such damages are assets of the bank, and are recoverable only in an action brought

by the bank, or for the benefit of all the stockholders and creditors.

The major premise is so nearly a self evident proposition that it requires no elaboration. It is recognized in Bailey *v.* Mosher, *supra,* and in the cases there cited. But we are not disposed to accept the minor premise. It is true, the petitions show misfeasance and mismanagement on the part of the defendants, as officers of the bank, and, that the bank thereby sustained damages, but they show more than that. They show that the defendants made and published false and misleading statements concerning the financial condition of the bank, whereby the plaintiffs were induced to become and remain its creditors to their damage. In short, whatever other allegation may be contained in the petition-, they also contain sufficient to constitute a common law action for deceit. That the party, upon whom the deceit or imposition was practiced by the officers of a national bank, may maintain an action against them in his own name and behalf for damages resulting to him therefrom, and that his right of action does not rest on the federal statutes but the common law, is no longer an open question. Stewart *v.* Bank, 57 Nebr., 576; Gerner *v.* Mosher, 58 Nebr., 135; 61 *id.,* 100; Prescott *v.* Haughey, 65 Fed., 653; Gerner *v.* Thompson, 74 Fed., 125;
199 King *v.* Pomeroy, 121 Fed., 287; Briggs *v.* Spaulding, 141 U. S. 132.

But, it is contended, that the petitions are substantially the same as that in Bailey *v.* Mosher, *supra,* and that the Circuit Court of Appeals held that such petition committed the plaintiff to the theory that his action was for misfeasance and mismanagement, resulting in damages to the bank, recoverable only in an action by the receiver for the benefit of all the stockholders and creditors. The difference between the petition in that case and those in the cases at bar has already been pointed out, and the importance which the Circuit Court of Appeals attached to some of the allegations of the petition in that case, which are omitted from those now before us, is shown by the following taken from the body of the opinion:

"We feel constrained to hold that, properly construed, the petition contains but one paragraph or count, and states but one cause of action, and that the cause of action stated is one for the misfeasance and mismanagement of the affairs of the bank by the defendants *and* its officers and directors. We can not adopt the view of the plaintiff in error,—that those clauses of the petition which state, or tend to state, a cause of action for deceit at common law, should be segregated from the other clauses of the petition, and held to constitute the statement of the cause of action. The court can not reject the allegations of the petition which do state a cause of action under the banking act, for the purpose of converting mere matter of inducement or surplusage, contained elsewhere in the petition, into a substantive statement of a cause of action different from that which the petition in terms declares to be the foundation of the action. The plaintiff was not bound to state the legal effect of the facts set out in his petition, but, having done so, he can not complain if his adversary and the court accept and act

upon his own theory. Especially is this so when the petition
200 is ambiguous, and will support that theory as well or better than any other.

"In the sense of the word, as used in code pleading, there is but one paragraph in this petition. The term 'paragraph' as used in code pleading, means an entire or integral statement of a cause of action. It is the equivalent of 'count' at common law. It may embrace one sentence or many sentences; but, whether one or many, it constitutes a statement of a single cause of action. It is a requirement of some codes that, if the petition contains 'more than one cause of action, each shall be distinctly stated in a separate paragraph and numbered,' (Code Arkansas, 5027) and all of them require that each cause of action shall be separately stated, and numbered. The Nebraska Code provides that 'where the petition contains more than one cause of action, each shall be separately stated and numbered.' Consol. St. Neb., 1891, 4633 (93). And the Supreme Court of that state, construing this section, have said: 'A plaintiff can not jumble his causes of action together.' Bank *v.* Bollong, 24 Nebr., 821, 40 N. W., 411. If, in drafting the petition, the pleader supposed he was stating more than one cause of action, he would undoubtedly have separately stated and numbered them, as required by the Nebraska Code. No one can point out in this petition where the statement of one cause of action ends and another begins. The plaintiff can not amend or reform his petition in this court. If it were possible to spell out of the averments of this petition, taken separately or together, an action for deceit, the court would be precluded from attaching that meaning to them by the positive statement contained in the petition itself that the action is grounded on the 'violations of the banking law' therein set out. Section 5239 of the Revised Statutes of the United States provided that:

'If the directors of any national banking association shall
201 knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall thereby be forfeited. * * * And in cases of such violation, every director who participated in, or assented to, the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.'

It is obvious that the plaintiff, in the inception of this case, had in view the enforcement of the defendants' liability under the last clause of this section."

From the foregoing it is clear that the court proceeded upon the ground that the plaintiff, by those allegations of his petition, which are omitted from those in the cases at bar, had committed himself to the theory that his cause of action was one arising under the federal banking law for misfeasance and mismanagement, resulting in damages to the bank. Those very allegations, it held, precluded it from "spelling out" a cause of action for deceit. If those allegations are to be held of so much importance when included in a petition,

it seems to us that their omission, and the studied omission of direct reference to the federal banking law, from the petitions in the cases at bar are equally significant. Besides, it was expressly held, in Jones *v.* Mosher, *et al.*, 107 Fed., 561, that the petition involved no federal question; consequently, it presented no case arising under the federal banking law. It, and the other petitions before us, do state a cause of action for deceit. We know of no rule of pleading that would justify this court in assuming that the plaintiff intended to plead a cause of action which he could not maintain, so long as he has pleaded facts sufficient to constitute one which he
202 could maintain. It may be said in passing that in this state, no such meaning is attached to the term "paragraph," as that given by the Court of Appeals in that case.

It is further insisted, that the judgment rendered in that case supports the plea of *res judicata*, interposed against the plaintiff Bailey in his present action. It is elementary that a cause of action, once finally determined between the parties on the merits, can not afterward, and so long as such judgment remains in force, be litigated by new proceedings, either before the same or any other tribunal. And this rule is not limited to judgments which are the result of a trial of an issue of fact, but applies as well to judgments on demurrer, where such judgments go to the merits of the case. Gould *v.* Evansville, etc. R. Co., 91 U. S., 526; Bissell *v.* Spring Valley Township, 124 U. S., 225; Angles *v.* Mellus, 59 Cal., 444; Gregory *v.* Woodworth, 107 Iowa, 151; Roadman *v.* Michigan Cent. R. Co., 59 Mich., 397. But a judgment on a demurrer which is based on a technical defect of pleading, a lack of jurisdiction, misjoinder of parties, or the like, does not involve the merits of the controversy and is not available as *res judicata*. House *v.* Mullen, 22 Wall., 42; Sivers *v.* Sivers, 97 Cal., 518; Roberts *v.* Hamilton, 56 Iowa, 683. When a plea of *res judicata* is interposed, the controlling question is, whether the judgment offered to support it is based on the merits of the controversy. If it is, it is conclusive and forecloses further investigation. Applying that test to the present case, we do not think the judgment of the court of Appeals, in Bailey *v.* Mosher, *supra*, supports the plea of *res judicata*. It does not dispose of the action for deceit on its merits, but on the technical ground that, by the averment of mere conclusions of law, the plaintiff had committed himself to the theory that the
203 action was of a different character, and precluded an examination of the merits of his action for deceit.

As to the other plaintiffs, it is insisted, that they are concluded by the judgments of dismissal, rendered in the respective cases by the federal court. It will be remembered, that in all of those cases, save that brought by Bailey, the dismissal was on the motion of the plaintiffs, and before the trial of any issue of law or fact. A dismissal, under such circumstances, does not operate as an estoppel, and is no bar to another action. Sec. 430, Code Civil Procedure, seems to embody the prevailing doctrine in regard to a voluntary dismissal, and provides, among other things, that an action may be dismissed by the plaintiff, before a final submission of the cause to

the jury, without prejudice to a future action. See Beals *v.* Western T. U. Co., 53 Nebr., 601; Bank *v.* State, 56 L*d.*, 188; Harrison *v.* Insurance Co., 80 N. W. (Ia.), 309. That the costs had not been paid in the cases voluntarily dismissed, does not estop the plaintiffs to prosecute these actions. So far as our practice is concerned, the most that can be said of the common law rule, making the payment of the costs in the former action a prerequisite to the prosecution of another, is, that it is one which the trial court, in the exercise of a sound discretion, may or may not apply. U. P. R. R. Co. *v.* Mertes, 35 Nebr., 204. The record shows no abuse of discretion in this instance.

It is next contended by the defendants that these causes were brought and prosecuted on the theory that they were actions for misfeasance and mismanagement. The record does not sustain that contention. It is true there is a large amount of evidence in the record tending to establish misfeasance and mismanagement of the affairs of the bank by the defendants. But this evidence was not introduced for the purpose of proving such facts, but was, in most instances, inseparably connected with evidence tending
204 to establish an action for deceit. That the court tried the cases as actions for deceit, is clearly shown, we think, by an instruction following the statement of the issues, in which the jury were instructed, that the burden of proof was on the plaintiffs to establish the allegations contained in their several petitions closing with these words: "In other words, the burden is upon the plaintiffs severally to show, that the defendants severally published, or caused to be published, or participated in the publication of the statements of the condition of the Capital National Bank * * * that the plaintiffs, each for himself, relied upon the truth of said statements; * * * that such statements were untrue * * *"

It is earnestly contended by the defendants, that the verdicts are not sustained by sufficient evidence. The evidence makes up three large volumes, and it is impossible to discuss it, save in the most general way, without extending this opinion to undue length.

It was incumbent on the plaintiffs to establish by a preponderance of the evidence, (1) That the defendants published the statements purporting to show the financial condition of the Capital National Bank or participated in the publication thereof; (2) That such statements were false; (3) That the plaintiffs severally relied upon such statements and believed them to be true, and were thereby misled to their injury. As to the first proposition, the evidence shows that none of the statements were actually made by all of the defendants, but that each defendant participated in making some of them. It is urged on behalf of the defendant Thompson that he participated *on* making but one of them. That is a mistake; the evidence is conclusive that he signed and participated in making at least four of them, the first being that made and published December 28, 1886, the last that made and published July 9,
205 1891. The mistake arises, perhaps, from the construction which the defendants seem to place on the petitions. The petitions set out two of the statements at length, but it is also alleged

that at divers other times and dates, between the 28th day of December 1886, and the 21st day of January, 1893, the defendants made and published other false and misleading reports purporting to show the condition of the bank which were relied upon by the plaintiff. The defendants appear to take the position, that the plaintiffs should be restricted to the two reports set out at length. We do not think so. The allegations of the petitions are sufficiently broad to admit proof of any and all statements made on and between the dates just mentioned. If definiteness and certainty required all such statements to be set out at length, the remedy was by motion.

As to the proposition that the statements were false, the evidence involves a maze of figures and computations covering a large portion of the bill of exceptions. The defendants contend, among other things, that the only discrepancies shown by the evidence are discrepancies between the balance book of the bank and the statements, and that such discrepancies are due to the fact that the comptroller of the currency, in pursuance of his authority under the federal banking law, required a different classification of the items in such statements, than that under which they were classified on the books of the bank; that the relation between the totals was not thereby disturbed, consequently, such discrepancies are immaterial. The contention is not borne out by the record. The evidence not only tends to show discrepancies between the statements and the books of the bank, but also between such statements and the actual condition of the bank when the statements were respectively made, and that such discrepancies materially disturbed the relation be-
206 tween the totals of the assets and liabilities of the bank, and made its condition appear better than what it actually was. In short, there is ample evidence to sustain a finding that the bank was insolvent before and during the period covered by the transactions of the plaintiffs with it; that had the statements been made in accordance with the facts they would have shown, notwithstanding the classification required by the comptroller of the currency the true condition of the bank, or at least sufficient to put prospective customers upon inquiry; but instead, they exaggerated the assets, depreciated the liabilities, and were so framed as to conceal the actual condition of the bank and convey the impression that it was not only solvent but prosperous. In the face of these facts, no manipulation of figures or refinement of argument can make it appear that the discrepancies are immaterial, or, that there is a lack of proof that the statements were false. We do not wish to be understood to say that all of the defendants knew that such statements were false; we are satisfied that such is not the case. But, as was said in Gerner *v.* Mosher, 58 Nebr., 135, it was their duty to know whether the statements made by them were true, and the fact that they made and published them without knowledge of their falsity is no defense.

As to the proposition that the plaintiffs relied upon such statements and believed them to be true, and were thereby misled to their injury, we consider it sufficiently established by the

evidence. The plaintiff Bailey testified, that he had had some money to invest and read the published statements of the different banks, including those of the Capital National, in order to keep himself informed of their condition. The following is a portion of his testimony on this point:

Q. How did you come to go to the Capital National Bank?

A. I went on purpose to see what they would pay on the
207 money. And I thought it was just as good as the First National.

Q. What information did you have as to the condition of the Capital National Bank?

A. As soon as I went in they handed me a card and the Directors and stockholders of the Bank were on that card. And I took the papers several years previous.

Q. What papers?

A. The Semi-Weekly Journal I believe and the Call.

Q. What did you see?

A. I saw the bank was in good circumstances, as I supposed, the way the amount of assets read in the published statements.

Q. Well, what did you read in those papers—published statements?

A. Yes—in the published statements in the paper.

Q. Of what bank?

A. The Capital National Bank of Lincoln, Nebr.

Q. State when it was, with reference to time——

A. I suppose ever since the bank started, for I read the papers every day and took particular notice. I had some money to loan out and I took a little notice where I thought was the best place to put it.

Q. And what reliance did you make, if any, upon these statements?

A. Well, that was all the reliance I had was what I could get information in the papers in regard to the standing of the bank.

Q. State what information, if any, you had other than what was disclosed in the statements that were published.

A. That was all the information I had.

Q. You may state where you got your information as to the condition of this bank.

A. I got it from the published statements.

Q. And from any other source?

208 A. No sir, I had no other source to get it from.

Q. State what effect those published statements had upon your transacting business at the Capital National Bank, if any?

A. Why that is all the effect I had to go by was the published statement, supposing it was to be true and correct.

Q. Did you believe it to be true?

A. I believed it to be true or I wouldn't have put my money there, I would have kept it where it was.

Q. Now you may state if you knew at any time, or had any means of knowing that the Capital National Bank * * * was not financially in the condition as represented by its statements

A. I had no means of knowing.
Q. Well, did you have any knowledge?
A. I had no knowledge.
Q. State what belief, if any, you put in those statements prior to the time you deposited your money in the bank.
A. I believed the statements to be true, or I never would have put my money in the bank, that is sure.

Cross-examination:

Q. And there was no bank in Lincoln, or in the state that you knew of, that stood higher in the general estimation than it?
A. Not in my own mind according to their statement. I don't think there was any in Lincoln any way.

His evidence, fairly construed, sufficiently shows that he relied upon the false statements, believed them to be true, and, consequently, that the bank was safe; that acting in that belief, and influenced by it, he transferred his business to such bank. It is true, his evidence shows that he was influenced somewhat by the higher rate of interest this bank was paying. But it is well settled, that where false statement is relied upon, and is a material inducement,
it is immaterial what other causes contributed to influence the
209 conduct of the injured party. Runge *v.* Brown, 23 Nebr.,
817; Foley *v.* Holtry, 43 *Id.*, 133; Alcott *v.* Bolton, 50 *Id.*,
179; Sioux City National Bank *v.* Norfolk State Bank, 56 Fed., 139. The evidence adduced on behalf of the other plaintiffs on this point is stronger than that adduced by Bailey, and is sufficient, we think, in each case to sustain a finding that the plaintiffs relied upon the statements, believed them to be true and were misled thereby to their injury.

We have gone over the evidence in this case with some care, fully alive to the liability of the jurors to draw wrong inferences, in cases of this character, owing to the lack of time and facilities to consider and weigh the mass of evidence introduced, and are thoroughly satisfied that every fact, essential to a recovery in these cases, is sufficiently sustained by the evidence. We have also gone over the several errors assigned, and have examined them in the light of exhaustive briefs and luminous oral arguments of the learned gentlemen representing the respective parties, but have found no reversible error.

It is therefore recommended that the several judgments be affirmed.

By the COURT: For the reasons stated in the foregoing opinion, the said judgments and each of them are affirmed.

210 And afterwards, to-wit, on the 24th day of November, 1905,
there was filed in the office of the Clerk of said Supreme Court a certain Motion in words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

No. 13033.

DAVID E. THOMPSON, CHARLES E. YATES, and LOUISA HAMER, Administratrix of the Estate of E. P. Hamer, Deceased, Plaintiffs in Error,

v.

THE BANK OF STAPLEHURST, Defendant in Error.

Motion for Rehearing.

Now comes the plaintiffs in error and each for himself moves the Court to grant a re-hearing in the above entitled cause for the following reasons:

1. The Court has erred in holding that the petitions on which the cases were tried in the District Court of Seward county stated a cause of action for deceit and fraud only, and not for the enforcement of any duties or liabilities of the directors, as officers of a national bank under the National Banking Act, and in construing said petitions as stating a different cause of action from that of the petitions filed in Lancaster county against the same defendants for the same cause of action, which are conceded and decided to be for the enforcement of duties and liabilities of the defendants under the National Banking Act.

2. The Court has erred in holding that it is bound by the construction placed upon the petitions by counsel for the plaintiffs in the actions commenced in Lancaster county, in pleading
211 the legal conclusion that these actions were for the enforcement of liability for violations of the duties and obligations of the Federal Banking Act, and that the omission of these legal conclusions in the petitions filed in Seward county upon the same causes of action justified the Court in holding that the rights, obligations and liabilities in the cases at bar are not determined by the Federal Banking Act, because the Court should have exercised its independent judgment in construing the petitions without regard to the construction of the pleader.

3. The Court has erred in holding that the petitions filed in the Seward County Actions stated a cause of action for fraud and deceit and different from those filed for the same cause of action in Lancaster county, because of the allegations of legal conclusions that the former were actions to enforce liability for violations of the Federal Banking Act which were omitted from the latter.

4. The Court has erred in determining the character of liability in these cases by looking to the petitions alone when the acts complained of and the character of liability should be determined by the issues joined between the parties and the evidence adduced pertaining to the law by which and under which the acts and things complained of were done.

5. The Court has erred in holding that the plaintiff could main-

tain his cause of action and recover damages in his own name as an individual depositor in the Capital National Bank.

6. The Court has erred in holding that a common law action of deceit could be maintained against the officers and directors of the Capital National Bank on account of the manner in which they managed and conducted the business of said bank, and in making and publishing reports to the Comptroller concerning the
212 condition of said bank, in performance of their duties under the National Banking Act which determined and provided the duties and liabilities of the defendants in their actions thereunder.

7. The Court has erred in holding that it was not necessary in establishing liability against the directors to show that the directors knew the falsity of reports to the Comptroller of the Currency, which they attested as required by the National Banking Act, because that Act provides for liability only in cases where they knowingly violate or knowingly permit the violation of the provisions of that Act.

8. The Court has erred in holding that the United States Court of Appeals in the case of Jones *v.* Mosher, 107 Fed. Rep., 561, decided that the plaintiff's petition did not involve any Federal question, and that the petitions did not state a cause of action when that Court did not decide the character of the case made by the petitions but only that it had no jurisdiction because the removal was made too late.

9. The Court has erred in holding and deciding that the defense reduced to its simplest form is that damages which result to a national bank from misfeasance and mismanagement of its officers are an asset of the bank recoverable from such officers only in an action by the bank for the benefit of all the stockholders, whereas, the defense actually made is that the only liability of the officers for acts done in the conduct of the business of the bank under the National Banking Act is that provided by the Banking Act and must be enforced against such officers for the benefit of all the creditors and stock holders for ratable distribution under the act.

213–218 12. The Court has erred in holding that the plaintiff is entitled to recover under the petitions filed for the reason that they state no sufficient cause of action for fraud, misrepresentation and deceit.

H. F. ROSE,
J. W. DEWEESE, AND
FRANK E. BISHOP,
Att'ys for Pl'ffs in Error.

* * * * * * *

219 And afterward, to-wit, on the 22nd day of February, 1906, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Judgment in the words and figures following, to-wit:

No. 13033.

CHARLES E. YATES ET AL., Plaintiffs in Error,
v.
BANK OF STAPLEHURST, Defendant in Error.

Error to the District Court of Seward County.

This cause coming on to be heard upon the motion of Defendant in Error for a rehearing on the motion to Quash Bill of Ex-
220 ceptions, was submitted to the Court; upon full consideration whereof, it is by the court ordered that said motion be, and the same hereby is overruled.

This cause further coming on to be heard upon the motion of Plaintiffs in Error for a rehearing herein, was submitted to the Court, upon full consideration whereof, the Court doth find no error apparent in the judgment heretofore entered herein by this Court; and it is therefore considered, ordered, and adjudged that said motion be, and the same hereby is overruled and a rehearing herein refused and denied.

Upon request of Plaintiffs in Error, it is by the Court ordered that mandate in the above entitled cause be, and the same hereby is withheld until the further order of the Court.

221 And on the same day, to-wit, the 22nd day of February, 1906, there was filed in the office of the Clerk of said Supreme Court a certain Petition for Writ of Error, which said original Petition for Writ of Error is hereto attached, and is in the words and figures following, to-wit:

222 In the Supreme Court of the State of Nebraska.

CHARLES E. YATES, DAVID E. THOMPSON, LOUISA HAMER, Administratrix of the Estate of Elis P. Hamer, Deceased; CHARLES W. MOSHER and RICHARD C. OUTCALT, Plaintiffs in Error,
vs.
BANK OF STAPLEHURST, Defendant in Error.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of the State of Nebraska:

The above named plaintiffs in error each complain that in the judgment, decision, record and proceedings in a certain cause pending in the Supreme Court of the State of Nebraska in which the above named plaintiffs in error were the plaintiffs in error and Bank of Staplehurst was defendant in error which cause was decided and determined by the Supreme Court of the State of Nebraska and judgment of affirmance rendered therein on October 19th, 1905, and

in which a motion for a re-hearing in said court was overruled on February 21, 1906 at which time the judgment of said court became final, which Supreme Court of the State of Nebraska was the highest court in which decision or judgment could be had in said action, in which action and the judgment and the decision thereon there was necessarily involved and decided by said court that the provisions of the National Banking Act of the United States did not control, limit and determine the obligations and liability of the plaintiffs in error as officers and directors of the Capital National Bank of Lincoln Nebraska upon their conduct of the business of said bank, and the performance of their duties under said National Banking Act and upon the reports made by the officers and attested by the directors of said bank to the Comptroller of the Currency,
223 and that said officers and directors of said bank were liable for an action of deceit on said reports notwithstanding the provisions of the National Banking Act, and, by said judgment and decision, refused to give full faith and credit to the judgment of the United States Circuit Court for the District of Nebraska, all in violation of the provisions of the National Banking Act and of Section 1, Article 4 of the Constitution of the United States, and of revised statutes of the United States Section 905, manifest error hath happened as appears from said judgment, decision and record and in the assignment of error herewith presented, to the great damage of the plaintiffs in error.

Wherefore, The said plaintiffs in error pray the allowance of a writ of error to the Supreme Court of the State of Nebraska for the removal of said record, judgment and proceedings in said action into the Supreme Court of the United States for its revision and correction thereof and for citation and supersedeas thereon, and your petitioners will ever pray.

DAVID E. THOMPSON,
By H. F. ROSE &
J. W. DEWEESE,
His Attorneys.
CHARLES E. YATES &
LOUISA HAMER, *Adm'x,*
By J. W. DEWEESE &
FRANK E. BISHOP,
Their Attorneys.
RICHARD C. OUTCALT AND
CHARLES W. MOSHER,
By CHAS. O. WHEDON,
Their Attorney.

Writ of error allowed and ordered to issue.
February 21 1906.

SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court of Nebraska.

[Endorsed:] 13033. Yates *v.* Bank of Staplehurst. Petition for Writ of Error. Supreme Court of Nebraska. Filed Feb. 22, 1906. H. C. Lindsay, clerk.

224 And on the same day there was filed in the office of the Clerk of said Supreme Court certain Assignments of Errors in words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

CHARLES E. YATES, DAVID E. THOMPSON, LOUISA HAMER, Administratrix of the Estate of Elis P. Hamer, Deceased; CHARLES W. MOSHER and RICHARD C. OUTCALT, Plaintiffs in Error,

v.

BANK OF STAPLEHURST, Defendant in Error.

Now come the said several plaintiffs in error, Charles E. Yates, David E. Thompson, and Louisa Hamer, administratrix of the estate of Elis P. Hamer, deceased, Charles W. Mosher and Richard C. Outcalt, and each separately and severally respectfully submit that in the record, proceedings, decisions and final judgment of the Supreme Court of the State of Nebraska, in the above entitled cause there is manifest error, in this, to-wit:

Assignments of Error.

1. The Supreme Court of the State of Nebraska has erred in affirming the judgment against the several plaintiffs in error as rendered in the District Court within and for Seward county, Nebraska, in favor of the defendant in error.

2. The Court has erred in deciding that the petition on which said cause was tried and decided states facts sufficient to constitute a cause of action in favor of the defendant in error and against the several plaintiffs in error, or either of them.

225 3. The Court has erred in deciding that the petition filed by the defendant in error as its cause of action sets forth a common law action for deceit and fraud based upon the reports made and attested by the plaintiffs in error to the Comptroller of the Currency as required by the National Banking Act.

4. The Court has erred in holding and deciding that the cause of action alleged by defendant in error, and on which judgment was rendered, is not governed and limited by the liability imposed upon the plaintiffs in error by the National Banking Act. (Title 62 U. S. Rev. Sts. of the U. S.)

5. The Court has erred in deciding that the common law action for deceit can be enforced against the plaintiffs in error based wholly upon the reports made by the President and Cashier of the Capital National Bank and attested by the directors of the said bank independent and exclusive of the liability imposed by the provisions of the National Banking Act under which they were acting in making, attesting and publishing such reports to the Comptroller of the Currency.

6. The Court has erred in deciding that Section 5239 of the Revised Statutes of the United States, being a part of the National

Banking Act, does not control, nor limit, or determine the liability of the plaintiffs in error in making, attesting and publishing the reports to the Comptroller of the Currency, showing the condition of the bank.

7. The Court has erred in deciding that the fact that those plaintiffs in error who were directors were without knowledge of any falsity of the reports attested by them or some of them, mentioned in the petition, was immaterial, and that such directors or
226 any of them were liable under the proofs showing they were without knowledge of the falsity of such reports; the said decision is in violation of the provisions of Section 5239 of the Revised Statutes of the United States which makes liability of the directors dependent upon the fact that they knowingly violated or knowingly permitted the violation of the provisions of the National Banking Act, and participated in or assented to such violation.

8. The Court has erred in deciding that a common law action of deceit based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by the directors of such bank can be maintained against such directors, without knowledge of any false statements in such reports, and without any participation in or assent to any violation of the National Banking Act as essential elements of the cause of action as required by Section 5239 of the Revised Statutes of the United States.

9. The Court has erred in deciding that, "The officers of a National Bank are personally liable for false reports made and published by them, in pursuance of Sec. 5211, Rev. St., U. S., to the party injured thereby and the right of the injured party to maintain the action does not rest on the federal statute, but the common law."

10. The Court has erred in deciding that the defendant in error could maintain his cause of action and recover damages against each of the plaintiffs in error in his own name and right as an individual depositor in the Capital National Bank, whereas the only recovery that could be had for false reports or violation of the
227 National Banking Act could be by the bank itself, or its receiver or representative, such recovery to be for the benefit of all the creditors and to be ratably distributed among them as required by Sections 5234 and 5236 of the National Banking Act.

11. The Court has erred in deciding the character of liability of the plaintiffs in error by looking to the petition alone, when the acts complained of, and the character of liability, should be determined by the issues joined between the parties, and the rights set up and claimed by the plaintiffs in error in their answers, and the evidence adduced pertaining to the National Banking law by which and under which the acts and things complained of were done, in violation of Section 709 of the Revised Statutes of the United States.

12. The Court has erred in deciding that it is bound by the construction placed upon the petition by counsel for the plaintiff in the same cause of action commenced in Lancaster county, by pleading the legal conclusion that the action was for the enforcement of liability for violation of the duties and obligations imposed by the

National Banking Act, and that the omission of such legal conclusion in the petition filed in this case, upon the same cause of action, justified the Court in deciding that the rights, obligations and liabilities in the case at bar are not determined by the National Banking Act, for the reason that the Court should have construed the petition without regard to the construction of the pleader, or his legal conclusions.

13. The Court has erred in deciding that the cause of action alleged by the defendant in error constituted a common law action for deceit, whereas the ground of complaint as shown in the
228 petition, and the recovery and judgment, are based upon the official misfeasance of the directors of the Capital National Bank, and their mismanagement of the same, in violation of their duties imposed upon them as officers and directors, by the National Banking Act.

14. The Court has erred in affirming the judgment, thereby approving instruction number 9th, given to the jury, which permitted the plaintiff to recover on a report of the condition of the bank, attested by the directors, even though such directors did not know that the report was in fact false or untrue. Said instruction 9th, being as follows:

"9th. Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages sustained by one depositing money in such bank in reliance upon the false representation of the condition of the Bank contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue."

15. The Court has erred in approving the refusal of the District Court of Seward County, Nebraska, to give instruction number 6 requested by plaintiffs in error. Which instruction is as follows:

"6. The jury are instructed that if you find from the evidence introduced in reference to any one of the directors named in any one of the said cases that such director did not knowingly violate any of the requirements of the National Banking Act, under which he was acting as such director, but acted in good faith, trust-
229 ing and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant."

Wherefore, said plaintiffs in error severally pray that the judgment of said Supreme Court of said State of Nebraska be reversed, and judgment be rendered herein in favor of said plaintiffs, and for costs.

H. F. ROSE AND
J. W. DEWEESE,
For Defendant David E. Thompson.
J. W. DEWEESE AND
FRANK E. BISHOP,
For Def'ts Hamer and Yates.
CHAS. O. WHEDON,
For Defendants Richard C. Outcalt and Charles W. Mosher.

Endorsed: 13033. Yates *v.* Bank of Staplehurst. Assignments of Error. Supreme Court of Nebraska. Filed Feb. 22 1906. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 23rd day of February, 1906, there was filed in the office of the Clerk of said Supreme Court a certain Writ of Error and Allowance thereof, which said original Writ of Error is hereto attached and is in the words and figures following, to-wit:

230 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Justices of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Nebraska before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said action between Charles E. Yates, David E. Thompson, Louisa Hamer, Administrator of Elis P. Hamer, deceased, Charles W. Mosher and Richard C. Outcalt, plaintiffs in error and Bank of Staplehurst defendant in error wherein was drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of the Statute of, or an authority exercised under said statute of Nebraska, on the ground of their being repugnant to the Constitution, statutes or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the right, title privilege or exemption specially set up or claimed under such clause of the said Constitution treaty or statute or commission, *and* manifest error hath happened to the great damage of the above named plaintiffs in error as by their complaint appears. We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein give*n*, that then under your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have the same in said Supreme Court at
231 Washington, within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the United States this 23rd day of February in the year of our Lord One Thousand Nine Hundred and six.

[Seal United States Circuit Court, District of Nebraska.]

GEO. H. THUMMEL,
Clerk Circuit Court of the United States
for the District of Nebraska,
By JOHN NICHOLSON, *Deputy.*

Allowed by

SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court
of the State of Nebraska.

[Endorsed:] 13033. Yates *v.* Bank of Staplehurst. Writ of Error. Supreme Court of Nebraska. Filed Feb. 23, 1906. H. C. Lindsay, Clerk.

232 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bond in words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

CHARLES E. YATES, DAVID E. THOMPSON, ET AL.
vs.
BANK OF STAPLEHURST.

Supersedeas Bond on Writ of Error.

Know all men by these presents, that we David E. Thompson, as principal and W. M. Leonard, as surety, are held and firmly bound unto Bank of Staplehurst in the sum of one thousand dollars to be paid to the Bank of Staplehurst defendant in error, its successors, representatives and assigns, to payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 21st day of February, 1906.

Whereas, The above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment lately rendered in the Supreme Court of the State of Nebraska in the above entitled action,

Now, Therefore, the condition of this obligation is such that if said David E. Thompson shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good,

then the above obligation to be void; otherwise to remain in full force and virtue.

DAVID E. THOMPSON.
W. M. LEONARD, *Surety.*

Sealed and delivered in the presence of
H. C. LINDSAY, *as Witness.*

233 Approved as Supersedeas Bond by
SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court of the State of Nebraska.

Endorsed: 13033. Yates *v.* Bank of Staplehurst. Bond. Supreme Court of Nebraska. Filed Feb. 23 1906. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bond in the words and figures following, to-wit:

In the Supreme Court, State of Nebraska.

CHARLES E. YATES ET AL.
vs.
BANK OF STAPLEHURST.

Cost Bond on Writ of Error.

Know all men by these presents, that we Charles E. Yates as principal and W. S. Yates as surety, are held and firmly bound unto Bank of Staplehurst in the sum of Five Hundred ($500) Dollars to be paid to Bank of Staplehurst, defendant in error, its successors, representatives and assigns to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 21 day of February, 1906.

Whereas, the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse a judgment lately rendered in the Supreme Court of the State of Nebraska, in the above entitled action,

Now, Therefore the condition of this obligation is such
234 that if said Charles E. Yates shall prosecute his writ of error to effect, and answer all costs if he fail to make his plea

good, then the above obligation to be void; otherwise to remain in full force and virtue.

CHARLES E. YATES,
By W. S. YATES, *Att'y in Fact.*
W. S. YATES, *Surety.*

Sealed and delivered in the presence of
H. C. LINDSAY,
As Witness.

Approved as a cost bond by
SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court of the State of Nebraska.

Endorsed: 13033. Yates *v.* Bank of Staplehurst. Bond. Supreme Court of Nebraska. Filed Feb. 23 1906. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bond in the words and figures following, to-wit:

In the Supreme Court, State of Nebraska.

LOUISA HAMER, Administratrix of Elis P. Hamer, Deceased, ET AL.
vs
BANK OF STAPLEHURST.

Cost Bond on Writ of Error.

Know all men by these presents, That we Louisa Hamer, administratrix of Elis P. Hamer, deceased, as principal, and A. G. Hamer, as surety, are held and firmly bound unto Bank of Staplehurst
235 in the sum of Five Hundred ($500) Dollars to be paid to Bank of Staplehurst defendant in error, its successors, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 23 day of February, 1906.

Whereas, The above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse a judgment lately rendered in the Supreme Court of the State of Nebraska, in the above entitled action.

Now, therefore, the condition of this obligation is such that if said Louisa Hamer, administratrix of Elis P. Hamer, deceased, shall prosecute her writ of error to effect, and answer all costs if she

fail to make her plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

LOUISA HAMER,
As Administratrix.
A. G. HAMER,
As Surety.

Sealed and delivered in the presence of
H. C. LINDSAY,
As Witness.

Approved as a cost bond by
SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court of the State of Nebraska.

Endorsed: 13033. Yates *v.* Bank of Staplehurst. Bond. Supreme Court of Nebraska. Filed Feb. 23 1906. H. C. Lindsay, Clerk.

236 And afterward, to-wit, on the 8th day of March there was filed in the office of the Clerk of said Supreme Court a certain Citation, which said original Citation is hereto attached and is in the words and figures following, to-wit:

237 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Bank of Staplehurst, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Nebraska, Wherein Charles E. Yates, David E. Thompson, Louisa Hamer admrx., Charles W. Mosher and Richard C. Outcalt are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable Samuel H. Sedgwick Chief Justice of the Supreme Court of the State of Nebraska this 23d day of February in the year of our Lord One thousand nine hundred and six.

SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court of the State of Nebraska.

Due and proper service of the within citation and the receipt of a copy thereof are hereby accepted, admitted and acknowledged this 8th day of March, 1906.

BANK OF STAPLEHURST,
Defendant in Error,
By LIONEL C. BURR,
JOHN J. THOMAS,
RICHARD S. NORVAL,
Its Attorneys.

Supreme Court of Nebraska Filed Mar. 8 1906.
H. C. LINDSAY, *Clerk.*

[Endorsed:] 13033. Charles E. Yates *v.* Bank of Staplehurst. Citation. Supreme Court of Nebraska. Filed Mar. 8, 1906. H. C. Lindsay, Clerk.

238 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that the foregoing is a true and correct transcript of the record, opinion of the court, and final judgment in a cause in said Court, wherein Charles E. Yates, Louisa Hamer, Administratrix of the Estate of Ellis P. Hamer, deceased, David E. Thompson, Richard C. Outcalt and Charles W. Mosher were plaintiffs in error and Bank of Staplehurst was defendant in error, as fully as the same is of record and on file in my office.

I further certify that the Bill of Exceptions, a part of the record in said case, herewith transmitted, consists of three volumes designated respectively Volume I, which consists of pages 1 to 612, inclusive; Volume II, which consists of pages 613 to 1320, inclusive; and Volume III, which consists of pages 1321 to 1761 inclusive.

I further certify that the annexed petition for a writ of error, writ of error, and citation are the originals which were lodged in my office, and the whole is now returned in obedience to said writ of error.

I further certify that I have duly retained in my office true and correct copies of said petition for a writ of error, writ of error and citation, with the indorsements thereon.

In testimony whereof I have hereunto set my hand and the Seal of said Court at Lincoln, this 9th day of March, A. D. 1906.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

239 UNITED STATES OF AMERICA, *Supreme Court of Nebraska, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my hand and affix the seal of said Supreme Court, in the City of Lincoln, this 9th day of March, A. D., 1906.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

MARCH 15, 1906.

Received of plaintiffs in error Seventy-two dollars & forty-five cents ($72.45) in full payment for within transcript.

H. C. LINDSAY,
Clerk Supreme Court.

240 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
BANK OF STAPLEHURST, Defendant in Error.

Notice.

Notice is hereby given to the above named defendant in error and his attorneys of record, that the assignments of error on which the plaintiffs in error will rely for a reversal of the judgment in said case are attached hereto, and in order to present said errors, the plaintiffs in error designate the certain portions of the transcript of the record in said case, and of the bill of exceptions of the evidence as applicable to the errors relied upon, and said designated portions to be printed in order to present the errors complained of as shown in the schedules attached hereto.

H. F. ROSE,
J. W. DEWEESE AND
FRANK E. BISHOP,
Attorneys for Plaintiffs in Error.

Received copy of this notice with copy of assignments of error and designated portions of the record to be printed this 27 day of April, 1906.

L. C. BURR,
R. S. NORVAL, AND
J. J. THOMAS,
Attorneys for Defendant in Error.

241 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
BANK OF STAPLEHURST, Defendant in Error.

Assignments of Error Relied Upon for Reversal and as Basis for Printing Record.

5. The court has erred in deciding that the common law action for deceit can be enforced against the plaintiffs in error based wholly upon the reports made by the President and cashier of the Capital National Bank and attested by the directors of the said bank inde-

pendent and exclusive of the liability imposed by the provisions of the National Banking Act, under which they were acting, in making, attesting and publishing such reports to the Comptroller of the Currency.

6. The court has erred in deciding that section 5239 of the Revised Statutes of the United States, being a part of the National Banking Act, does not control nor limit or determine the liability of the plaintiffs in error in making, attesting and publishing the reports to the Comptroller of the Currency showing the condition of the bank.

7. The court has erred in deciding that the fact that those plaintiffs in error who were directors, were without knowledge of any falsity to the reports attested by them, or some of them, mentioned in the petition, was immaterial and that such directors or any of them were liable under the proofs showing they were without knowledge of the falsity of such reports. The said decision is in violation of the provisions of Section 5239 of the Revised Statutes of the United States which makes liability of the directors dependent upon the fact that they knowingly violated, or knowingly permitted the violation of the provisions of the National Banking Act, and participated in or assented to such violation.

8. The court erred in deciding that a common law action of deceit based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by the directors of such bank, can be maintained against such directors without
242 knowledge of any false statements in such reports, and without any participation in or assent to any violation of the National Banking Act as essential elements of the cause of action, as required by section 5239 of the Revised Statutes of the United States.

9. The court has erred in deciding that, "the officers of a National Bank are personally liable for false reports made and published by them, in pursuance of section 5211, Revised Statutes of the United States, to the party injured thereby and the right of the injured party to maintain the action does not rest on the Federal Statutes, but the common law."

10. The court has erred in deciding that the defendant in error could maintain his cause of action and recover damages against each of the plaintiffs in error in his own name and right as an individual depositor in the Capital National Bank, whereas the only recovery that could be had for false reports or violation of the National Banking Act could be by the bank itself or its Receiver or representative, such recovery to be for the benefit of all of the creditors and to be ratably distributed among them as required by section- 5234 and 5236 of the Nationa- Banking Act.

11. The court has erred in deciding the character of liability of the plaintiffs in error by looking to the petition alone, when the acts complained of, and the character of liability, should be determined by the issues joined between the parties, and the rights set up and claimed by the plaintiffs in error in their answers, and the evidence adduced pertaining to the National Banking law by which

and under which the acts and things complained of were done, in violation of section 709 of the Revised Statutes of the United States.

12. The court has erred in deciding that it is bound by the construction placed upon the petition by counsel for the plaintiff in the same cause of action commenced in Lancaster County, by pleading the legal conclusion that the action was for the enforcement of liability for violation of the duties and obligations imposed by the National Banking Act, and that the omission of such legal conclusions in the petition filed in these cases, upon the same
243 cause of action, justified the Court in deciding that the rights, obligations and liabilities in the case at bar are not determined by the National Banking Act, for the reason that the court should have construed the petition without regard to the construction of the pleader, or his legal conclusions.

13. The court has erred in deciding that the cause of action alleged by the defendant in error constituted a common law action for deceit, whereas the ground of complaint as shown in the petition and the recovery and judgment, are based upon the official misfeasance of the directors of the Capital National Bank, and their mismanagement of the same, in violation of their duties imposed upon them as officers and directors by the National Banking Act.

14. The court has erred in affirming the judgment, thereby approving instruction number 9th given to the jury, which permitted the plaintiff to recover on a report of the condition of the bank, attested by the directors, even though such directors did not know that the report was in fact false or untrue.

Said instruction 9th being as follows:

"9th. Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages sustained by one depositing money in such bank in reliance upon the false representations of the condition of the bank, contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue."

15. The court has erred in approving the refusal of the District Court of Seward County, Nebraska, to give instruction number 6 requested by plaintiffs in error. Which instruction is as follows:

"6th. The jury are instructed that if you find from the evidence introduced in reference to any one of the directors named in any one of the said cases, that such director did not knowingly violate any of the requirements of the National Banking Act, under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant."

16. The court has erred in deciding that the judgment of dismissal entered by the Circuit Court of the United States for
244 the District of Nebraska on February 9th, 1894, in an action then and there pending in which the defendant in error herein was plaintiff, and the plaintiffs in error herein were defend-

ants, which judgment was affirmed by the Circuit Court of Appeals, reported in 65 Federal Reporter 488, which judgment was entered upon the same cause of action and for the same right to recover as is asserted in this case, is not a bar to this action, and an adjudication of the rights between the parties to the judgment herein; and in refusing to give full faith and credit to said judgment of the Circuit Court of the United States for the District of Nebraska, in violation of the provisions of the Constitution of the United States, Article 4, Section 1.

H. F. ROSE,
J. W. DEWEESE, AND
FRANK E. BISHOP,
Att'ys for Pl'ffs in Error.

245 In the Supreme Court of the United States.

CHARLES E. YATES, LOUISA HAMER, Administratrix; DAVID E. THOMPSON, C. W. MOSHER and R. C. OUTCALT, Plaintiffs in Error.

vs.

BANK OF STAPLEHURST, Defendant in Error.

Designation for Printing from the Transcript of the Record in the Above Entitled Case.

The plaintiffs in error in the above entitled case, request the Clerk of the Supreme Court of the United States to print the following designated portions of the transcript of the record applicable to the errors alleged in the above entitled case, number 640, to wit:

1. Title, venue and petitions in error of Charles E. Yates and Louisa Hamer administratrix, and David E. Thompson, of the transcript, pages 1 to 12 inclusive.

2. Transcript page 15, amended petition and answer of David E. Thompson, commencing near the bottom of said page with words "And afterwards on the 16th day of March, 1899," to and including the first two lines at the top of page 34.

(The answer and all pleadings of Walsh, and the Walsh estate should be omitted, as no judgment was rendered against them.)

3. Transcript page 40, answer of Charles E. Yates and Louisa Hamer, administratrix, commencing with the words, "And afterwards on the 15th, day of July, 1901," to and including page 44.

4. Transcript page 54, plaintiff's reply, commencing with the words, "And afterwards on the 24th, day of August, 1901" and ending on the same page with the words, "By E. Jacobs president."

246 5. Transcript page 58, stipulations, commencing with the words, "And afterwards on the 28th, day of May, 1902," ending near the top of page 60 with the signatures to the stipulation.

6. Transcript page 62, trial proceedings, commencing with the

words "And afterwards on the 28th, day of May, 1902," ending on page 63, with the adjournment of court until the next day.

7. Transcript page 69, instructions given and refused and verdict, commencing with the words, "And afterwards on the 19th day of June, 1902," to and including the first paragraph on page 92, ending with the word "Judge" thereon.

8. Transcript page 93, instructions refused, commencing with the first paragraph to and including page 94, except the last paragraph, ending with the word "Judge" thereon.

9. Transcript page 109, motions for new trial, commencing with the third line from the top of the page and ending with the first three lines at the top of page 120.

10. Transcript page 120, judgment, commencing with the last line thereon, to and including page 125.

11. Transcript page 127, filing in Supreme Court, commencing with the word "endorsed" and ending with the words, "from — page to —" on said page.

12. Transcript page 129, motion, stipulation and order on bill of exceptions, commencing near the bottom with the words, "And on the same day there was filed," to and including about half of page 133 ending with the words, "The bill of exceptions."

13. Transcript page 190, proceedings, judgment, opinion and motion on re-hearing in the Supreme Court, ending near the top of page 213 with signature of attorneys.

247 14. Transcript page 219, order on re-hearing and proceedings on writ of error, commencing with the words, "And afterwards on the 22nd, day of February, 1906, to and including page 239.

H. F. ROSE,
J. W. DEWEESE AND
F. E. BISHOP,
Att'ys for Pl'ffs in Error.

248 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
BANK OF STAPLEHURST, Defendant in Error.

Designating for Printing from the Bill of Exceptions of the Evidence in the Above Entitled Case.

The plaintiffs in error in the above entitled case request the Clerk of the Supreme Court of the United States to print the designated portions of the bill of exceptions as follows, (The numbers refer to red figures at lower right hand corner of pages), to-wit:

There being no assignments of any errors on account of the offer and rejection of testimony, all objections and exceptions to testimony in the bill of exceptions of the evidence are to be omitted from the printed record.

1. Title, pages 1 and 2.

2. Testimony of A. D. Lynch, pages 8 to 13 inclusive.

3. Correspondence and oaths, page 14 to near the middle of page 21, (Similar oaths were taken by the directors from the beginning of the bank to the time of its failure in 1893).

4. Report of December 9th, 1892 and certificate of publication on reverse side, pages 39 and 40, front and reverse side, omitting objections.

5. Bank Charter, pages 52 and 53, omitting objections.

6. Letters to and from Comptroller, pages 56 except the first line, to 64 inclusive, omitting objections.

7. Publication of reports, page 68 commencing with the words "Notice of publication in the State Journal," to page 69 inclusive, omitting objections.

8. Publication of reports, commencing near the middle of page 76 with the words, "Mr. Norval, I now offer in evidence exhibit No. 980," and page 77 inclusive, omitting objections.

9. Testimony of H. J. Whitmore, page 340.

10. Cross-examination of H. J. Whitmore, page 708 *including* objection.

249 11. Cross-examination of H. J. Whitmore, page 709 commencing with the last question on said page with these words: "I will ask you to state whether these reports that you have referred to," to the end of the answer to that question on page 710, inclusive.

12. Testimony of E. Jacobs, page 864 to page 896 inclusive, omitting objections.

13. Testimony of E. Jacobs, page 901, beginning with the first question thereon, to page 903, ending with the answer: "I had no other source," omitting objections.

14. Testimony of E. Jacobs page 911 beginning with the question, to the words, "Witness excused" on page 916, omitting objections.

15. Testimony of Thomas Bailey, page 916 to the words "Witness excused," on page 934, omitting objections.

16. Testimony of Fritz Beckard, page 934, beginning with the words, "Mr. Fritz Beckard called as witness," to the words, "Witness excused" on page 949, omitting objections.

17. Testimony of H. T. Jones, page 974, to the words "Yes, sir," near the middle of page 975, omitting objections.

18. Testimony of H. T. Jones, page 977 to the last question on page 981, omitting objections.

19. Testimony of H. T. Jones, page 983 beginning with the first question thereon, to page 984, inclusive.

20. Testimony of C. E. Yates page 1111, commencing with the words "Mr. C. E. Yates called as a witness," to page 1121, ending with the words, "Witness excused," omitting objections.

21. Testimony of D. E. Thompson, page 1132 to the words "Witness excused," page 1188, omitting objections.

22. Former adjudication in the Bailey case, pages 1242 to 1274, inclusive, omitting objections.

250 23. Bank reports, pages 1297, commencing with words: "Mr. Thomas, the plaintiffs offer in evidence exhibit No.

1074," and exhibit number 1074 (7 sheets) attached, omitting objections.

24. Bank reports, pages 1304 and exhibit number 1075 (7 sheets) attached, omitting objections.

H. F. ROSE,
J. W. DEWEESE AND
F. E. BISHOP,
Att'ys for Pl'ffs in Error.

251 [Endorsed:] File No. 20142 Supreme Court U. S. October Term, 1905 Term No. 233 Charles E. Yates *et al.*, Plaintiffs in Error *vs.* Bank of Staplehurst. Assignment of errors & designation by P. E. of parts of record to be printed with notice and acceptance of service. Filed May 1, 1906.

252 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
BANK OF STAPLEHURST, Defendant in Error.

Designation for Printing from the Bill of Exceptions of the Evidence in the Above Entitled Cause.

The defendant in error in the above entitled cause having been served with notice on April 27, 1906, by the plaintiffs in error, of certain designations for printing from the bill of exceptions of the evidence in said cause, does now hereby request the Clerk of the Supreme Court of the United States to print the following designated portions of the bill of exceptions aforesaid in addition to that heretofore designated by the plaintiffs in error as aforesaid.

1. Commencing with the words "Oath of Directors" on page 36, to the words "R. C. Outcalt, Notary Public" at page 37 inclusive.

2. Certificate. Commencing with the words "Treasury Department. Office of" on page 54, take to the words "Deputy & Acting Comptroller of the Currency" on page 55 inclusive.

3. Report of August 1, 1887, including all of page 73.

4. Report of October 5, 1887, including all of page 75.

5. Commencing at top of page 79, to the words "Accts. solicited, Banks, Bankers and Merchants" on same page.

6. Report of December 12, 1888, including all of page 81.

7. Report of September 30, 1889, including all of page 84.

8. Report of December 11, 1889, including all of page 86.

9. Report of December 19, 1890, including all of page 88.

10. Report of July 9, 1891, including all of page 91.

11. Report of September 25, 1891, including all of page 93.

12. Report of December 2, 1891, including all of page 96.

13. Testimony of H. T. Jones, commencing at top of page 102, to the middle of page 108 inclusive, omitting objections and rulings thereon.

253 14. Testimony of G. W. Post, commencing on page 108 with the following words "G. W. Post called as a witness on behalf of the plaintiffs" etc., to the last question on page 112 inclusive, omitting objections and rulings thereon.

15. All testimony of G. W. Post on pages 110, 111 and 112 except the last question, omitting objections and rulings thereon.

16. Testimony of Edward Hurlbert, Jr., commencing on page 114, to and including the first question and answer thereto on page 118, ending with the words "A. I do not," omitting objections and rulings thereon.

17. Redirect examination of Edward Hurlbert, Jr., commencing with page 132 and including page 133 except questions and answers numbered 5, 6 and 7, and including page 134 to the words "that is all," omitting objections and rulings thereon.

18. Testimony of Edward Hurlbert, Jr., on page 145, commencing with the words "By Mr. Thomas" to and including the words "Witness excused."

19. Testimony of A. L. Clark on pages 146 to 148 inclusive to the words "Witness excused," omitting objections and rulings thereon.

20. Testimony of F. S. Johnson on pages 148 to 150 inclusive, omitting objections and rulings thereon.

21. Testimony of Leonidas M. Lawson, commencing at page 159, to and including first answer on page 178 as follows: "A. No such payment was made" omitting objections.

22. Testimony of William Ayres, Jr., commencing at page 182, to and including first question and answer on page 184.

23. Same witness, commencing with the last question on page 201, including all of page 202 and the first two lines on page 206, omitting objections.

24. Same witness, commencing with last question on page 213, to and including the first answer on page 214, omitting objections.

25. First two lines on page 240.

26. Certificate of judgment, Exhibit 991, on page 242.

254 27. Testimony of I. A. Baker on page 243. The 1, 2 and 3 questions and answers, omitting objections.

28. Certificate of judgment. Exhibit 992, on page 245.

29. Last question and answer on page 244, omitting objection.

30. All of page 247, omitting objections.

31. All of Exhibit 993, on page 249.

32. Testimony of I. A. Baker on pages 251 and 252, omitting objections.

33. All of Exhibit 994, on page 253.

34. Testimony on page 255, omitting objections.

35. All of Exhibit 995, on page 257 including last two lines on page 256.

36. Testimony of G. W. Shreck, pages 280 to 284 inclusive, omitting objections and rulings thereon.

37. Testimony of C. W. Hamilton from page 296 to 300 inclusive, omitting objections.

38. By-laws. Section 17 on page 318, and Section 26 on page 319.

39. On page 323 commencing with the words "Page 36—Special Meeting" to and including the first ten lines on page 324 and ending with the words "R. C. Outcalt, Sec'y."

40. Testimony of H. J. Whitmore, commencing with page 340, to and including second answer on page 343 ending with the words "to the Marsh National" omitting objections.

41. Same witness, on page 345 commence with the last question—take to and including first ten lines on page 348, ending with the figures "$15,050.88," omitting objections.

42. Same witness, on page 348, commence with the last question and take to and including the first four lines on page 352, ending with the words "Donnell, Lawson & Simpson."

43. Same witness, on page 354, commence with the first question and take to and including the second answer on page 356, ending with the words "Marsh National Bank" omitting objections.

44. Same witness, on page 357, commence with offer of Exhibit No. 1002 in following words "The entry offered, received and
255 read in evidence being as follows" and take to and including the last answer on page 371, ending with the words "of the Bank on that day," omitting objections.

45. Same witness, on page 372 commence with the second question (11 line from the top) and take to and including the first line on page 375, ending with the words "A. No sir," omitting objections.

46. Same witness, on page 375, commence with the second question on 14 line and take to and including the first line on page 376, ending with the words "A. Yes sir."

47. Same witness, all of page 379, omitting objections.

48. Same witness, on page 380, the second question and answer thereto, omitting objections.

49. Same witness, on page 382, commence with the last answer (5 line from bottom of page) and take to and including the last answer on page 384, ending with the words "A. No, there are none" omitting objections.

50. Same witness, on page 385, commence with the last two lines at bottom of page and take to and including page 392, omitting objections.

51. Same witness, on page 400, commence with the 12 line from the bottom and include that question and the answer following, ending with the words "A. I do."

52. Same witness, on page 401, commence with the 7 line from the bottom with the words "have you made an investigation" etc. and take to and including answer thereto on page 402, ending with the words "Yes sir" omitting objections.

53. Same witness, on page 404, commence with the third question and answer from bottom of page and include balance of page.

54. Same witness, on page 405, commence with third question (14 line from top of page) and take to and including the answer at top of page 406, ending with the words "it does" omitting objections.

55. Same witness, on page 432, commence with eighth line from the bottom (third question) and take to the bottom of page 438 omitting objections.

256 56. Same witness, on page 442, commence with the third question from the top (seventh line) take to and including answer on page 443 ending with the words "2nd of July."

57. Same witness, on page 444, commence with the second question near middle of page with the words "I will ask you" etc. and take to and including sixth answer on page 446, ending with words "I couldn't determine it from the books I have here to my own satisfaction."

58. Same witness, on page 453, commence with the fifth line (second question) from top of page and take to and including page 454, omitting objections.

59. Same witness, on page 457, commence with the two last lines at bottom of page and take to and including first two lines on page 459.

60. Same witness, on page 459, commence at third line from the bottom (last question) and take to bottom of page 460, omitting objections.

61. Same witness, on page 462, commence at top of page and take to the middle of page 464 ending with the words "Q. Does that include the surplus? A. No sir," omitting objections.

62. Same witness, on page 465, commence with thirteenth line from the bottom of the page (second question from bottom) and take to and including first thirteen lines on page 504, omitting objections.

63. Same witness, on page 520, commence at top of page omitting first line and take to and including all of page 527 omitting objections.

64. Same witness, on page 531, commence with second question (sixth line from top of page) and take to and including eleventh line from top of page 532 ending with the words "A. No sir" omitting objections.

65. Same witness, on page 535 commence with second question at top of page (nineth line from top) and take to and including the first line on page 554, omitting objections and omitting also the third question and answer on page 536 being lines from 16 to 19 inclusive.

66. Same witness, on page 561, commencing at top of page, to and including all of page 563, omitting objections.

257 67. Same witness, on page 564, commence at top of page and take to and including all of page 587.

68. Same witness, on page 588, take first four lines (first question and answer).

69. Same witness, on page 599, commence with first question (tenth line from top of page) and take to fifth line from bottom on page 591 ending with the words "shown in the published statement" omitting objections.

70. Same witness, on page 592, commencing with the last question on that page and take to the bottom of page 600 inclusive, omitting objections.

71. Same witness, on page 655, commence with the sixth question (twelfth line from top of page) and take the balance of that page.

72. Same witness, on page 679, commence at top of page and take to bottom of page 693 inclusive, omitting objections.

73. Same witness, all of pages 708, 709, 710, 711 and 712 *including objections and rulings of court thereon.*

74. Same witness, all of page 713 except the last question, ending with the words "is these copies of published statements."

75. Same witness, on page 755, question on that page and answer thereto on page 756 omitting objections.

76. Same witness, all of page 758 except the last question at bottom of page, omitting objections.

77. On page 765 commence with the second question at the middle of page and take to and including the first answer (first four lines) at top of page 769, omitting objections.

78. Same witness, take last question on page 793 and answer thereto on page 794.

79. Same witness, take question on page 812 and answer thereto on page 813, omitting objections.

80. Schedules of certificates of taxes. Commence at top of page 813 and take to middle of page 829 inclusive, to the words "cross examination."

258 81. Testimony of E. Jacobs. Commence at top of page 864 and take to and including page 903, omitting objections.

82. Same witness, commence with question on page 911 and take the remainder of witness'*es* testimony to the words "witness excused" on page 916, omitting objections.

83. All of testimony of Thomas Bailey, pages 916 to 934 inclusive, omitting objections.

84. All of the testimony of Fritz Beckard, pages 934 to 949 inclusive omitting objections.

85. Testimony of Whitmore on pages 950 and 951 except last question on page 951, omitting objections.

86. Same witness, on page 960, commence with the second question (thirteenth line) and take to and including the first answer (first twelve lines) on page 963, omitting objections.

87. Same witness, on page 968, commence with the third question (tenth line) and take to page 970 inclusive ending with the fourth answer on the eleventh line.

88. Testimony of H. T. Jones. Commence at top of page 974 and take to and including first answer (fifth line) on page 1037, ending with the words "honestly kept" omitting objections.

89. Bill of sale and chattel mortgage. Commencing at top of page 1199 and take to and including page 1204.

90. Take first four lines on page 1312.

91. Deposition of John W. McDonald, Receiver. Take all of page 1323.

92. Same witness, on page 1325 take the first and second questions and answers.

93. Same witness, on page 1360, commence with the words "April 8, 1902, 2 O'Clock P. M." Ques. 197, and take to bottom of page 1370 inclusive omitting objections.

94. Same witness, on page 1374, commence with the words "re-

direct examination" and take to bottom of page 1377 inclusive, omitting objections.

259 95. Deposition of J. E. Hill. Commence at page 1382 and take to and including page 1392 ending with answer to question No. 299 with the words "A. I did not."

96. Same witness, take all of page 1408.

97. Deposition of D. J. Carnes. Commence at top of page 1417 and take to and including answer to interrogatory 28 on page 1423 ending with the words "into a good many thousands of dollars."

98. Same witness, on page 1427, commence with the words "redirect" (fourth line from top) take to and including signature of "Frank Langlas, Jr., Notary Public" on page 1429.

99. Deposition of P. M. Alden on page 1429. Commence with the words "P. M. Alden of lawful age" etc., take to and including answer to interrogatory 34, Page 1432 (nineth line from top).

100. Same witness, on page 1436, commence with the word "redirect" and take to and including the words "Frank Langlas, Jr., Notary Public" near bottom of page 1437.

101. Deposition of John W. McDonald, Receiver. Commence at top of page 1441 and take the first four questions and answers on same page, ending with the words "A. Yes" on fifteenth line.

102. Same witness, on page 1452, commence with the fourth question (sixteenth line from top) with the words "you may produce record book No. 1" etc., and take to and including the third answer on page 1458 ending with the words "A. They were rediscounted."

103. Same witness, on page 1463, commence with the words "May 15, 1902, 9 A. M." and take to and including the third answer on page 1466, ending with the words "A. Yes, I think so" omitting objections.

104. Same witness, take last question on page 1466 and answer thereto on page 1467, ending with words "A. Yes" omitting objections.

105. Same witness, on page 1471, commence with fourth question (thirteenth line from top) and take to and including the first answer on page 1472 ending with the words "A. Yes" omitting objections.

106. Same witness, on page 1473, commence with the third question (fourteenth line) take to and including the first ques-

260 tion on page 1474 ending with the words "Q. You may refer to the ledger?" omitting objection.

107. Same witness, on page 1484, commence with the words "Thomas: I now repeat my original question" etc., and take to and including second answer (eighth line) on top of page 1488, ending with the figures "A. $331,359.86," omitting objections.

108. Same witness, on page 1492, commence with the last question on seventh line from bottom of page and take to and including first question and answer on page 1504 ending with the figures "A. $300,000." omitting objections.

109. Same witness, on page 1504, commence with the last question at bottom of page (sixth line from bottom) and take to and including first question and answer at top of page 1506.

110. Same witness, on page 1508, commence with the fourth question (fourteenth line from top) and take to and including third answer on page 1519 ending with the words "Oh—I think they have very little value."

111. Same witness, on page 1521, commence with the last question (fourth line from bottom of page) and take to and including second answer on page 1524 ending with the words "Yes" on ninth line from top.

112. Same witness, commence at top of page 1540 and take to bottom of page 1541 inclusive, omitting objections.

113. Testimony of R. C. Outcalt. Commence at top of page 1548 and take to cross-examination on page 1606, omitting objections.

114. Testimony of Hale. Commence at top of page 1612 and take to and including answer to fifth question on page 1622 (seventh line from top of page) omitting objections.

115. Same witness, on page 1623, commence with the second question from the bottom and take to bottom of that page.

116. Same witness, on page 1624, take last question on that page and first answer on page 1625.

117. Same witness, take last question on page 1625 and all of page 1626 except the last two lines, ending with the words "A. They could not."

261 118. Same witness, on page 1647, commence with the third question (fourteenth line from top) with the words "Now Mr. Hale" etc. and end with the direct examination near bottom of page with the words "A. They are, Yes sir."

R. S. NORVAL,
L. C. BURR, &
J. J. THOMAS,
Attorneys for Defendant in Error.

Received a copy of the above designations for printing from the bill of exceptions of the evidence in the above entitled cause this 7th day of July, 1906, but we object to printing the designated portions of the record because not necessary to a review of the errors relied upon for reversal, and the costs of printing the same should be taxed to defendant in error.

H. F. ROSE,
J. W. DEWEESE, AND
F. E. BISHOP,
Attorneys for Plaintiffs in Error.

262 [Endorsed:] 233, 20142. In the Supreme Court of the United States. Charles E. Yates, *et al.*, Plaintiffs in error, *vs.* Bank of Staplehurst, Defendant in error. Designations for printing from the bill of exceptions.

263 [Endorsed:] File No. 20,142. Supreme Court U S. October Term, 1906. Term No. 233. Charles E. Yates *et al.*,

Pl'ffs in Error, *vs.* Bank of Staplehurst. Designation by counsel for the defendant in error of additional parts of bill of exceptions to be printed & proof of service of copy — same. Filed July 13th, 1906.

Endorsed on cover: File No. 20,142. Nebraska supreme court. Term No. 233. Charles E. Yates, David E. Thompson, Louisa Hamer, adm'x of Elis P. Hamer, deceased, *et al.*, plaintiffs in error, *vs.* Bank of Staplehurst. Filed March 20th, 1906. File No. 20,142

FILE COPY.

YATES ET AL. VS. JONES NATIONAL BANK ET AL.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
FILED.
FEB 4 1907
JAMES H. McKENNEY
CLERK

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
vs.
JONES NATIONAL BANK, *Defendant in Error*. } No. 230

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
vs.
UTICA BANK, *Defendant in Error*. } No. 231

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
vs.
THOMAS BAILEY, *Defendant in Error*. } No. 232

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
vs.
BANK OF STAPLEHURST, *Defendant in Error*. } No. 233

BRIEF FOR PLAINTIFFS IN ERROR.

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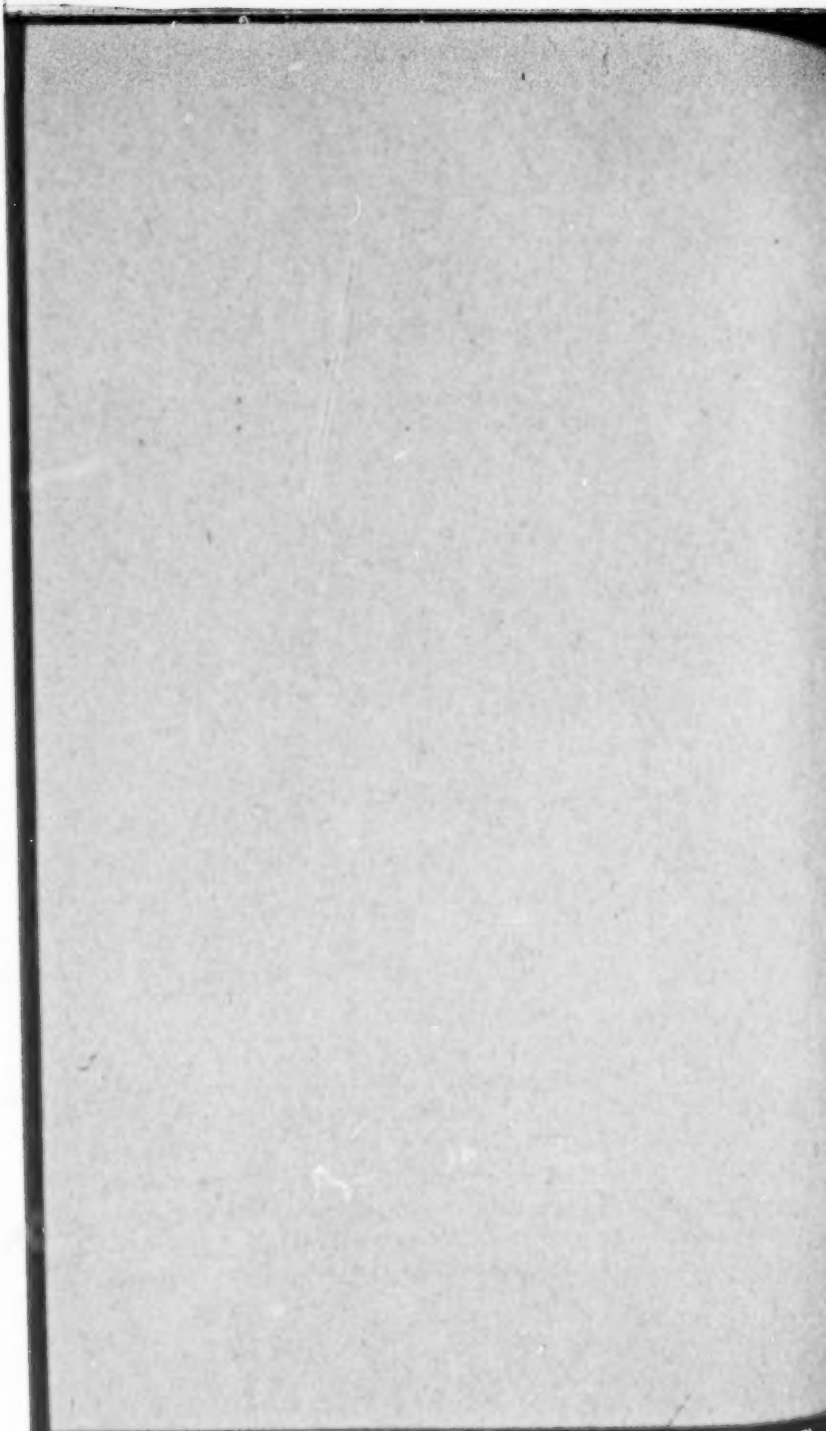
Jacob North & Co., Legal Blank Manufacturers and Printers, Lincoln, Neb.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
vs.
JONES NATIONAL BANK, *Defendant in Error*. } No. 230

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
vs.
UTICA BANK, *Defendant in Error*. } No. 231

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
vs.
THOMAS BAILEY, *Defendant in Error*. } No. 232

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
vs.
BANK OF STAPLEHURST, *Defendant in Error*. } No. 233

BRIEF FOR PLAINTIFFS IN ERROR.

These cases grew out of the failure of the Capital National Bank of Lincoln, Nebraska, in January, 1893. C. W. Mosher was president of the bank and R. C. Outcalt was cashier. The Comptroller of the Currency appointed a receiver who took charge of the bank to collect and distribute the assets under the National Banking Act. The plaintiffs in error, Charles E. Yates, David E. Thompson

and E. P. Hamer, together with others, were directors of said bank. Subsequently Hamer died and his estate is represented in these cases by Louisa Hamer, as administratrix. Each defendant in error was a depositor in, and lost money by reason of the failure of, the bank. All of the four cases are alike except as to names and amounts claimed, and were all tried together at one time before the same court and the same jury, and were all heard in the Supreme Court of the State at one time and governed by one decision. Each case involves the same identical questions, except that in the Bailey case a question of former adjudication is involved. Each of the plaintiffs in error is sued in his individual capacity as a director of the Capital National Bank. They contend that their liability, if any, is controlled and must be determined by a consideration of their duties as directors acting under the law governing a national bank. That these actions are for misfeasance and mismanagement of the affairs of the bank; and, further, that the individual liability of the directors is governed by section 5239 of the National Banking Act, where, in acts done, or duties neglected, they

"knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title; * * * and in cases of such violation every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person shall have sustained in consequence of such violation."

The defendants in error claim that these are common law actions of deceit, and that the liability of the plaintiffs in error is not governed by the National Banking Act.

The important question to determine therefore is the character of these suits and the law applicable to and governing the charges made against the plaintiffs in error.

It may aid the court to have a brief history of this litigation by reference to the different petitions filed, the several decisions of the courts, both State and Federal, and the manner of the trial resulting in the final decision now complained of.

No defense is here made for Charles W. Mosher and R. C. Outcalt, the President and Cashier of the bank. We appear only for the three directors, Yates, Thompson and Hamer.

Soon after the failure of the bank each one of the defendants in error brought an action against the president and cashier, and each of the directors of the bank in the District Court in Lancaster County, Nebraska, to recover the amount he had on deposit at the time of the failure.

The defendants demurred to the petitions for the reason that the damages, if any, were an asset of the bank, which could not be recovered by the plaintiffs, and that the petitions did not state facts sufficient to constitute a cause of action against the defendants.

The cases were all removed to the Federal Court.

On motions to remand, the Circuit Court overruled the motion in the Bailey case, sustained the demurrer, and dismissed that case with judgment for costs, leaving the other cases undisposed of on the docket until a final decision could be had in the Bailey case in the Court of Appeals. The decision of that court will be found in 63 Fed. Rep. page 488, where the ruling of the lower court on the motion to remand and on the demurrer filed by the defendant, was affirmed. Said judgment is still in full force and effect. Bill Ex. page 256.

After the decision of the Court of Appeals in the

Bailey case, the plaintiffs in the other three cases dismissed their several suits without prejudice and brought the present suits in Seward County, Nebraska, including a new suit by Bailey against the same defendants named in the first suit, notwithstanding the final judgment and dismissal of his case in the Federal Court.

The four different petitions in the Lancaster cases were alike, except the names of the plaintiffs and the amounts claimed; and the same fact is true of the four different petitions subsequently filed in Seward County. The Lancaster petitions and the Seward petitions are, in legal effect, the same, but the wording is changed in the Seward petitions, plainly indicating an effort on the part of the pleader, to avoid the federal question, and the consideration of the National Banking Act in determining the liability of the directors.

We call attention to the wording of the petitions in the first actions brought as compared with the wording in the second actions brought to show that the two different actions are the same, in effect, althought in the last actions an effort was made on the part of the plaintiffs to so word their petitions as to avoid the federal question.

The petition filed in the first case by Bailey in Lancaster County, which is the same as the other three petitions, will be found on page 258 of the bill of exceptions. It will be seen that the plaintiff charged that the defendants were officers and directors of the "Capital National Bank, which was duly organized and incorporated under and by virtue of the banking laws of the United States." That the defendants named "were the directors and officers of said bank and as such directors and officers had entire and exclusive control and manage-

ment of the business and affairs of said bank;" that the plaintiff deposited money in the bank, and that subsequently the bank failed on January 23, 1893, and the plaintiff was damaged by the loss of his money deposited. That the Comptroller of the Currency had appointed a receiver who had possession and control of the assets of said bank. That on December 9, 1892, "in compliance with the laws of the United States and upon the order and direction of the Comptroller of the Currency of the United States," the president and cashier, Mosher and Outcalt, made a statement of the condition of said bank and that Yates and Phillips attested the same while "acting as directors of said bank," and caused the same to be published in the daily newspapers of general circulation. That the defendants made other statements regularly, as required by law, to the Comptroller of the Currency, and caused the same to be published in the newspapers. That a similar report was made by Mosher and Outcalt and attested by D. E. Thompson as director on December 28, 1886, and both reports were attached to the petition as exhibits "A" and "B." It is alleged that the statements thus made were false and untrue, and the assets and liabilities of the bank incorrectly stated for the purpose of misleading and deceiving the plaintiff and others, and to induce the plaintiff and others to loan and deposit money in said bank; that each of the defendants had knowledge of the falsity and incorrect statements in the reports, and that they were grossly negligent and careless in their duty in the management of the affairs of said corporation. That they ought to have known of such deceit and falsity; that loans of money were made for large amounts to Charles W. Mosher, the President of the bank, and to his brother, E. W. Mosher, and to R. C. Outcalt, the Cashier of said bank, in excess of the amount allowed by law to be loaned to any one person; and that the defendants

regularly declared and paid dividends when there were no net profits out of which such dividends could be paid, and that "by reason of the several violations of the banking law, as above set forth, the several defendants have become and are liable to this plaintiff for the damages he has sustained."

The Court of Appeals in construing the petitions filed in Lancaster County, (63 Fed. Rep. 489) said:

"We feel constrained to hold that, properly construed, the petition contains but one paragraph or count, and states but one cause of action, and that the cause of action stated is one for the misfeasance and mismanagement of the affairs of the bank by the defendants as its officers and directors."

That court affirmed the judgment of the lower court sustaining the demurrer to the petition.

After the disposal of the cases commenced in Lancaster County, the present actions were commenced by the same plaintiffs in Seward County. These petitions will be found on pages 6 and 7 in the printed transcripts filed in this Court.

In these new petitions it is alleged that "at the several times mentioned, the defendants acted as the directors and officers of the Capital National Bank, a corporation duly organized and doing a general banking business in the city of Lincoln, Nebraska, and as such directors had the full control and management of said bank. That, acting as such directors and officers of said bank it became and was the duty of the defendants and each of them under the law as well as by the by-laws of said bank to actively and actually manage and superintend the business of the same." To diligently look after the loans and discounts, examine the books and all the assets of the

bank, and to include in its statements only valuable assets and not to include such as were worthless or of little value.

That the defendants failed to perform their duties as imposed upon them "by law and by the by-laws of said bank" and by reason of such failure large loans were made by the bank to insolvent persons and to its officers, relatives and favorites; that the defendants permitted and allowed and caused to be published to the public, and to the plaintiff false statements which they knew, and were in duty bound to know, were false and untrue. Such statements being made while "the bank was in fact in an insolvent condition and was and had been in an insolvent condition since and prior to December 9, 1892, and *that such insolvency resulted from the careless and negligent manner in which the defendants acting as such directors and officers managed and superintended the bank and its business.*" That "the defendants had knowledge of such insolvency, or ought to have known and could have known by the exercise of ordinary care in the discharge of their duties as directors or acting directors."

That "on the 28th day of December, 1886, the defendants acting as such directors and officers of said bank," and "on December 9, 1892, for the purpose of inducing the plaintiff and others to do and continue business with the bank, caused, allowed and permitted false statements of the condition of the said bank, its resources and liabilities, which statements are attached to the petition, marked exhibits A and B. Said statements were made, caused, allowed and permitted to be made and published by the said defendants as such directors and officers of said bank, and permitted said false statements to be published in the newspapers."

The petitions concluded as follows: "Plaintiff states

that by reason of the facts as above set forth and the false and fraudulent statements, advertisements and representations of the defendants, the plaintiff has been damaged in the sum of $15,000."

The cases thus filed in Seward County were removed to the federal court, and a motion to remand was sustained. See Bailey vs. Mosher et al., 74 Fed. 15. When remanded to the State Court the several petitions were amended in 1897. The cases were then continued from term to term until March 16, 1899, when the plaintiffs again amended their petitions by interlineation, at which time the cases were again removed to the federal court, and the court refused to remand, holding that the petitions, as amended, raised a federal question. See Bailey vs. Mosher et al., 95 Fed. 223.

The plaintiffs then carried one case to the Court of Appeals, and the judgment of the lower court was reversed and remanded, the Court of Appeals holding that if there was a federal question raised by the petitions as finally amended by interlineation, the same federal question appeared in the amended petition filed in 1897, and therefore the removal was too late. See Jones vs. Mosher et al., 107 Fed. 561.

It will be noticed that the State Court in its decision stated that the case was remanded to the State Court by the decision in 107 Fed. "for the reason that it involved no federal question." This is clearly a mistake. The Court of Appeals expressly disclaimed any attempt to decide that question, and simply held that the application for removal should have been filed at once after the amendment was made; no such application having been made within the time prescribed by law, the right of removal was waived.

In both sets of petitions the same cause of action is alleged, the same neglect of duty under the law by the directors of a National Bank while acting in their official capacity as such directors; the same violation of the duty imposed upon them by the law and by-laws of the Capital National Bank.

In the first set of petitions it was alleged that the "Capital National Bank was duly organized and incorporated under and by virtue of the banking laws of the United States."

In the second set of petitions, at Seward, it is alleged that, "at the several times hereinafter mentioned the defendants acted as directors and officers of the Capital National Bank, a corporation duly organized and doing a general banking business."

In the first set it is alleged that the "defendants were the directors and officers of said bank, and as such directors and officers had entire and exclusive control and management of the business and affairs of said bank."

In the Seward petitions it is alleged that it was the "duty of the defendants and each of them under the law as well as the by-laws of the said bank, to actively and actually manage and superintend the business of the same."

In the first set it was alleged that "in compliance with the laws of the United States and upon an order and direction from the Comptroller of the Currency of the United States, the said defendants" made certain reports of the condition of the bank.

In the second it was alleged that the defendants "made, caused, allowed and permitted to be made statements by

said defendants as such directors and officers of said bank, the said defendants and each of them acting as such directors and officers of said bank."

The bank, being a national bank, could not be "duly organized" under any law except under the National Banking law. No bank in the United States is permitted to use the word "National" in its title except it be organized under the National Banking Act. Sec. 5243, of said Act. United States vs. Northway, 120 U. S. 336.

It was further alleged in the Seward petitions "that acting as such directors and officers of said bank it became and was the duty of the defendants and each of them *under the law as well as the by-laws of said bank* to actively and actually manage and superintend the business of the same."

In the case of Walker vs. Windsor Nat'l Bank, 56 Fed. 80, it was held that the performance of duties imposed by law and the by-laws of a National bank necessarily meant the duties imposed by the National Bank Act.

In the first set of petitions it is alleged that the plaintiffs were damaged "by reason of the several violations of the banking law as above set forth."

In the Seward petitions it is alleged that the plaintiffs were damaged "by reason of the facts as above set forth and the false and fraudulent statements."

The facts set forth and the statements referred to are the same in both sets of petitions, except certain legal conclusions.

The decision of the State Court now under consideration lays stress upon the fact that certain legal conclusions

set forth in the first petitions being omitted from the second petitions, has great weight in determining the character of the actions now under consideration; and saying further, "we know of no rule of pleading that would justify this court in assuming that the plaintiff *intended* to plead a cause of action which he could not maintain." Transcript 61.

Is it possible that a court will be governed, in construing a pleading, by what it assumes was the *intention* of the pleader, rather than give effect to the pleading itself?

The State Court in speaking of the decision of the federal court on the Lancaster petitions further said:

"It does not dispose of the action for deceit on its merits, but on the technical ground that by the averment of *mere conclusions of law* the plaintiff had committed himself to the theory that the action was of a different character and precluded an examination of the merits of his action for deceit."

If it be true that mere conclusions pleaded amount to nothing, then the first and second petitions are the same in legal effect.

In the case of Goldwashing Co. vs. Keys, 96 U. S. 202, it is held:

"The office of a pleading is to state facts and not conclusions of law. It is the duty of the court to declare the conclusions, and of the papers to state the premises."

And again on page 203, the court says:

"The immunities of the statutes are in effect conclusions of law from the existence of the particular facts. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough, for that is the precise question the court is called upon to determine."

The State Court concludes that the two sets of petitions are substantially the same. P. 57.

"The petitions in the latter cases as they stood at the time of the trial are substantially the same as those in the former save that it is not alleged in the latter that the Capital National Bank was organized under the laws of the United States, nor that the statements therein mentioned purporting to show the financial condition of said bank were made in pursuance of the banking laws of the United States, or on the demand of, or to the Comptroller of the Currency."

But the statements complained of and introduced by the plaintiffs below were (as shown on their face) in fact the reports of the Capital National Bank made to the Comptroller of the Currency. Page 275 of the bill of exceptions. The reports on which plaintiff relied and introduced in evidence were brought by one of the officials in the office of the Comptroller, from Washington, for use in the trial. Bill exceptions, page 1 and following.

The statements that were published in the newspapers were copies of these reports to the Comptroller. See the evidence of H. J. Whitmore, the expert bank examiner, called by the plaintiff. Page 134 of the bill of exceptions.

The two sets of petitions differ alone in the wording of the same cause of action, and if the legal conclusions set forth in one, and omitted in the other, justified the State Court in assuming that there was a different cause of action, such difference was eliminated by the facts proved in the trial.

The State Court accordingly held:

"1. Damages, resulting to a National bank, from the misfeasance or mismanagement of its officers, are assets of the bank, and are recoverable only in an action brought

by the bank, or for the benefit of all the stockholders and directors thereof."

This holding agrees with the decision of the Federal Court in the first actions brought above referred to.

ISSUES JOINED—ANSWERS.

The decision of the State Court under consideration, seems to be based entirely on the construction of the *petitions* filed, as though the federal rights related alone to the question of removal. But it will be seen that answers were filed by each of the defendants, alleging that the Capital National Bank was duly organized under and in accordance with the National Banking Act; and that each of said defendants, in all of the acts complained of, acted, (as also alleged in the petition,) in his official capacity as a director of a National bank, and claimed the protection of the National Banking Act as governing the defendants and their liability under the facts alleged against them. Printed transcript in Bailey case, page 16.

The State Court erred in deciding the character of the suits, by looking alone to the legal conclusions in one set of petitions, and the studied omission of such conclusions in the other, while neither the assertion nor the omission of such conclusions determined the character of the suits. The court should have looked to the answers filed and the issues joined in the trial of the cases in determining the character of the actions, and character of liability of these defendants.

ASSIGNMENTS OF ERROR.

In the trial of these cases each of the plaintiffs in error has made separate assignments of error, as will be seen in the printed record, but such assignments of error are the

same for each plaintiff in error except in the Bailey case, in which the defense of former adjudication is involved, and an assignment of error on the question of former adjudication is made in his case, and relied upon by him in addition to the other assignments relied on by all of the plaintiffs in error.

The plaintiffs in error each rely upon the following errors in the decision of the State Court:

2. The Court has erred in deciding that the petition on which said cause was tried and decided states facts sufficient to constitute a cause of action in favor of the defendant in error and against the several plaintiffs in error, or either of them.

3. The Court has erred in deciding that the petition filed by the defendants in error as its cause of action sets
235 forth a common law action for deceit and fraud based upon the reports made and attested by the plaintiffs in error to the Comptroller of the Currency as required by the National Banking Act.

7. The Court has erred in deciding that the fact that those plaintiffs in error who were directors were without knowledge of any falsity of the reports attested by them or some of them, mentioned in the petition, was immaterial, and that such directors or any of them were liable under the proofs showing they were without knowledge of the falsity of such reports; the said decision is in violation of the provisions of Section 5239 of the Revised
236 Statutes of the United States which makes liability of the directors dependent upon the fact that they knowingly violated or knowingly permitted the violation of the provisions of the National Banking Act, and participated in or assented to such violation.

8. The Court has erred in deciding that a common law action of deceit based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by the directors of such bank can be maintained against such directors, without knowledge of any false statements in such reports, and without any participation in or assent to any violation of the National Banking Act

as essential elements of the cause of action as required by Section 5239 of the Revised Statutes of the United States.

9. The Court has erred in deciding that, "The officers of a National bank are personally liable for false reports made and published by them, in pursuance of Section 5211, Rev. St., U. S., to the party injured thereby and the right of the injured party to maintain the action does not rest on the federal statute, but the common law."

10. The Court has erred in deciding that the defendant in error could mantain his cause of action and recover damages against each of the plaintiffs in error in his own name and right as an individual depositor in the Capital National Bank, whereas the only recovery that could be had for false reports or violation of the National Banking Act could be by the bank itself, or its receiver or representative, such recovery to be for the benefit of all the creditors and to be ratably distributed among them as required by Section 5234 and 5236 of the National Banking Act.

237 11. The Court has erred in deciding the character of liability of the plaintiffs in error by looking to the petition alone, when the acts complained of, and the character of liability, should be determined by the issues joined between the parties, and the rights set up and claimed by the plaintiffs in error in their answers, and the evidence adduced pertaining to the National Banking law by which and under which the acts and things complained of were done, in violation of Section 709 of the Revised Statutes of the United States.

12. The Court has erred in deciding that it is bound by the construction placed upon the petition by counsel for the plaintiff in the same cause of action commenced in Lancaster county, by pleading the legal conclusion that the action was for the enforcement of liability for violation of the duties and obligations imposed by the National Banking Act, and that the omission of such legal conclusion in the petition filed in this case, upon the same cause of action, justified the Court in deciding that the rights, obligations and liabilities in the case at bar are not determined by the National Banking Act, for the reason that the Court should have construed the petition without

regard to the construction of the pleader, or his legal conclusions.

13. The Court has erred in deciding that the cause of action alleged by the defendant in error constituted a common law action for deceit, whereas the ground of complaint as shown in the petition, and the recovery and judgment, are based upon the official misfeasance of the directors of the Capital National Bank, and their mismanagement of the same, in violation of their duties imposed upon them as officers and directors by the National Banking Act.

238 14. The Court has erred in affirming the judgment, thereby approving instruction number 9th, given to the jury, which permitted the plaintiff to recover on a report of the condition of the bank, attested by the directors, even though such directors did not know that the report was in fact false or untrue. Said instruction 9th, being as follows:

"9th. Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages sustained by one depositing money in such bank in reliance upon the false representation of the condition of the bank contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue."

15. The Court has erred in approving the refusal of the District Court of Seward County, Nebraska, to give instruction number 6 requested by plaintiffs in error. Which instruction is as follows:

"6. The jury are instructed that if you find from the evidence introduced in reference to any one of the directors named in any one of the said cases that such director did not knowingly violate any of the requirements of the National Banking Act, under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant."

IN THE BAILEY CASE.

16. The court has erred in deciding that the judgment of dismissal entered by the Circuit Court of the United States for the District of Nebraska, on February 9, 1894, in an action then and there pending in which the defendant in error herein was plaintiff, and the plaintiffs in
236 error herein were defendants, which judgment was affirmed by the Circuit Court of Appeals, reported in 63 Federal Reporter 488, which judgment was entered upon the same cause of action and for the same right to recover as is asserted in this case, is not a bar to this action, and an adjudication of the rights between the parties to the judgment herein; and in refusing to give full faith and credit to said judgment of the Circuit Court of the United States for the District of Nebraska, in violation of the provision of the constitution of the United States, Article 4, Section 1.

ARGUMENT.

I.

The Damages an Asset of the Bank.

If it be true, that the defendants acting in their official capacity as directors of the Capital National Bank mismanaged the bank in the various ways alleged, and wasted the assets of the bank by reason of the neglect of their duties under the law and the by-laws of said bank, and from which neglect of duties the bank became insolvent, and, as alleged in the petitions, "such insolvency resulted from the careless and negligent manner in which the defendants, acting as such directors and officers, managed and superintended the bank and its business," then the damage resulting was an asset of the bank.

Being an asset of the bank the damage could not be recovered by the individual depositors who lost money in the failure of the bank.

The damages could only be recovered by the bank, or the receiver of the bank, for the benefit of the creditors.

In Conway vs. Halsey, 44 N. J. Law, 463-464, it is held that:

"A National bank corporation is a distinct person in law in whom the corporate property is vested and to whom all its agents and officers are responsible for all torts and injuries diminishing or impairing its property. * * * That all sums which could in any form be recovered on that account would be assets of the corporation and be applied in the first instance to the payment of the debts, the surplus only being distributed among the stockholders. Thompson on Liability of Directors, 351; Field on Corporations, sec. 328."

The Court of Appeals in the first cases brought against these same defendants, 63 Fed. 491, said:

"The petition shows that the bank of which the defendants are officers and directors, is insolvent and has passed into the hands of a receiver appointed by the Comptroller of the Currency under the National Banking Act. The liability of the defendants, whatever it may be, for the acts complained of in the petition is an asset of the bank belonging equally to all the creditors in proportion to their respective claims, and cannot be appropriated in whole or in part by a single creditor to the exclusive payment of his own claim. It is the policy of the National Banking Act to secure the ratable distribution of the assets of an insolvent National bank among all its creditors. Assuming that the defendants are liable in damages for the acts complained of, they are liable at the suit of the receiver who is the statutory assignee of the bank and the proper party to institute all suits for the recovery of the assets of the bank of whatever nature to the end that they may be ratably distributed among its creditors. Rev. Stat. U. S., sec. 5236. Kennedy vs. Gibson, 8 Wal., 498; Bank vs. Colby, 21 Wal. 609; Hornor vs. Henning, 93 U. S. 228; Stevens vs. Overstoltz, 43 Fed. 771; Bank of Peters, 44 Fed. 13. The law will not allow one creditor to appro-

priate the whole liability of the directors to his own benefit. It is well settled that the injury done to the stock and capital of a corporation by the negligence or misfeasance of its officers and directors is an injury done to the whole body of stockholders in common and not an injury for which a single stockholder can sue. Smith vs. Hurd, 12 Metc. 371; Howe vs. Barney, 45 Fed. 668. The same rule applies to the creditors of a corporation."

In Kennedy vs. Gibson, 8th Wall., 506, it is held:

"The claims of creditors may be proved before the Comptroller, or by suit against the association. Creditors must seek their remedy through the Comptroller in the mode prescribed by the statute; they cannot proceed directly in their own names against the stockholders or debtors of the bank. The receiver is the statutory assignee of the association, and is the proper party to institute all suits."

In the case of Cockerell vs. Cooper, 86 Fed. 13, it is held:

"The directors of a bank, being agents of the corporation, are bound by the law of agency to act within the scope of the bank's charter and by-laws, and to exercise at all times a reasonable degree of care and diligence in the discharge of the duties which they have been appointed to perform. If they are guilty of a culpable violation of this obligation and the corporation thereby sustains damage, the directors are personally liable therefor to the corporation while it is a going concern and to its receiver when it has become insolvent."

Hornor vs. Henning, 93 U. S. 228.

If the plaintiffs can maintain these suits and recover from the directors and appropriate all their property to the satisfaction of the personal claims of plaintiffs, it necessarily follows that every other creditor as well as every stockholder of the bank could, for the same reasons recover from these defendants. So that as held by Chief

Justice Shaw in the case of Smith vs. Hurd, 12 Metcalf, 371, there might be as many actions and recoveries as there were creditors or shareholders for one and the same default of the directors. If this can be done, the policy of the National Banking Act, providing for a ratable distribution of all of the assets among the various creditors, would be defeated, and the assets in the nature of such damage be wasted in fruitless and expensive litigation and in the multiplicity of suits.

If these suits can be maintained, and recoveries had for the personal benefit of the plaintiffs, it follows that the directors at the time of the failure of the bank and since, had the *right to pay the plaintiffs the amount of their respective claims;* and having that right, they could, for whatever reasons they saw fit, prefer these plaintiffs as favored creditors and give them the whole amount of their claims, even if it rendered the defendants unable to pay the claims of other similar creditors. But this would be a direct violation of Section 5242 of the National Banking Act, holding all such preferences and attempts at preference of one creditor over another to be utterly null and void; and it would defeat the ratable distribution of the assets of the bank as provided in Section 5236.

On this point see the case of Gatch vs. Fitch, 34 Fed. Rep. 569.

In the case of Davis vs. Elmira Savings Bank, 161 U. S. 284, the court in discussing the question says:

"It cannot be doubted that one of the objects of the National bank system was to secure, in the event of insolvency, a just and equal distribution of the assets of National banks among all unsecured creditors, and to prevent such banks from creating preferences in contemplation of insolvency. The public aim in favor of all

citizens of every state of the Union is manifested by the entire context of the National Bank Act."

In National Bank vs. Colby, 21 Wall. 609, 613, 614, the Court said:

"As to the general creditors, the act evidently intends to secure equality among them in the division of the proceeds of the property of the bank.

"The fifty-second section (evidently meaning Sec. 5242) further to secure this equality, declares that all transfers by an insolvent bank of its property of every kind, and payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by the act, or 'with the view to the preference of one creditor over another, except in the payment of its circulating notes, shall be utterly null and void.'

"There is in these provisions a clear manifestation of a design on the part of Congress: 1st, to secure the government for the payment of the notes, not only by requiring in advance of their issue, a deposit of bonds of the United States, and by giving to the Government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank; and, 2d, to secure the assets of the bank for ratable distribution among its general creditors.

"This design would be defeated if a preference in the application of the assets could be obtained by adversary proceedings."

If the plaintiffs, in their action, can hold the directors personally liable to them in actions of deceit for violations of duty in the attesting of official reports to the Comptroller, every other creditor could proceed in the same way and exhaust all of the property, and the ability of the directors to pay, and thus prevent the enforcement of the double liability of the directors as stockholders as provided for in the National Banking Act, and also defeat the statutory liability imposed by Section 5239.

The Cases Were Tried as For Mismanagement.

From the foregoing it will be seen that these causes of action are grounded upon the charges of negligence and mismanagement of the Capital National Bank by the officers and directors in their official capacity. Not only so, but the causes were tried upon the charge of negligence, misfeasance and mismanagement. Three weeks of time were consumed in getting the proof before the court and jury in extensive details of facts concerning the character of the assets of the bank, and in attempting to show misconduct on the part of the managing officers of the bank in making bad investments and loaning vast sums of money without proper security; declaring and paying dividends out of the capital of the bank when there were no net profits; and to show the careless manner in which the President and Cashier handled the funds and assets of the bank and caued its insolvency, by reason of which the bank was not able to pay its debts and passed into the hands of a receiver appointed by the Comptroller of the Currency.

Not only so, but the trial involved the management of the old Marsh National Bank, managed by Mosher and Outcalt, but with which none of the defendant directors in these cases were connected; and also the management of the Capital National Bank long before, as well as long after the issuance of any of the reports complained of in these cases; and the examination did not stop even with the failure of the bank, but ran on into the manner and method of handling the assets of the bank by the receiver.

Only two reports were set out in the pleadings, one of December 28, 1886, and one of December 9, 1892, but the whole history of the Marsh National as well as the Capital National banks and of the receivership after the failure,

was developed before the jury to show that the directors violated their oaths, to the effect that they would not "knowingly violate nor willingly permit to be violated any of the provisions of the Statutes of the United States under which said association has been organized," and for more than the whole period of the bank's existence.

In the trial the investigation was not confined to the alleged false statements of the bank's condition, but covered the history of the bank and its transactions long before and after the reports complained of.

In order to show that the directors violated their duties in the management of the bank, the oaths that were yearly taken by each of the directors and forwarded to the Comptroller of the Currency were procured and produced in evidence for several years prior to the failure of the bank. Some of the oaths may be found on page 7, and following, of the bill of exceptions. These were used in connection with facts about mismanagement, to show that the directors had violated their oaths, they having sworn that they would not "knowingly violate nor willingly permit to be violated any of the provisions of the Statutes of the United States under which said association has been organized."

This long investigation extending over three weeks followed by proof tending to show, or introduced for the purpose of showing, that the directors, acting in their official capacity as directors of the Capital National Bank, were guilty not only of neglect of their duty as covered by their oaths under the United States Statute, but also for positive and affirmative acts of wrongful distribution of the capital of the bank in dividends to the stockholders, and the careless investment of the assets in worthless bills and notes, and business enterprises.

The bill of exceptions consists of 349 pages of closely printed matter, and a mere glance at any page of said document will show the constant effort, by long tables of figures, and the testimony of witnesses concerning records and bank accounts, bad debts and unsecured loans, to show mismanagement of the bank.

In accordance with the manner of the trial for mismanagement, the trial court instructed the jury on the liability of the defendants by reason of the mismanagement of the bank, as follows:

In the fifth paragraph of the instructions the court reviews the issues and explains to the jury what the plaintiffs claim, as follows (page 24, Bailey Tr.):

"That by reason of the worthlessness of said assets and by reason of the excess of the liabilities, and by reason of the management and inattention and gross negligence of the defendants, the said bank about the 21st day of January, 1893, suspended business, closed its doors and was taken possession of by a receiver; and that by reason of the premises the plaintiffs lost the sums of money severally at that time on deposit in said bank, as heretofore set forth."

In the 16th paragraph of the Court's instructions, the jury are told as follows (page 28, Bailey Tr.):

"You are instructed that proof that the president or cashier misappropriated or embezzled funds of the bank or falsified the books of account, is not of itself sufficient to establish *actionable negligence* against the directors who have not participated therein; but if such embezzlement or misappropriation or falsification are of such great extent and are of such long continuance as would upon reasonable examination challenge the attention of an ordinarily prudent business man, then you would be justified in finding that the directors were charged with notice of such misappropriation or embezzlement and falsification."

Again in the 17th instruction, the jury are told as follows (page 28):

"It is the duty of the bank officers and directors to give to the affairs of a bank such reasonable care and supervision and oversight as ordinary men of business prudence exercise in the supervision and care of their own business affairs and concerns which they delegate to the immediate administration of others."

So far as anything appears in the trial of the cases and the verdicts of the jury, the instructions of the court to the jury directing their attention to the mismanagement of the bank and the damages resulting therefrom, the jury gave effect to these instructions in their verdicts representing the amount of damages growing out of the alleged negligence of the directors in the mismanagement of the bank.

II.

National Banking Act, One Complete System.

In the passage of the National Banking Act Congress provided for one complete system for the government, control and management of National banks.

No State legislature, nor any State Court, can in any manner interfere with the system adopted, nor the purposes for which National banks are organized, nor to divert or change the distribution of the assets of a National bank in a manner that would conflict with the provisions of the National Banking Act. That which is beyond the plane of State jurisdiction by direct legislation cannot be brought within such plane by indirection, and therefore the directors of a National bank cannot be held by a State court responsible for acts done in their *official capacity*, so as to enforce a different liability from that imposed upon them by the National Banking Act. If

that were permitted it would be possible to control or nullify a United States law and prevent the enforcement of its provisions.

In re Waite, 81 Fed. 371.

In the case of Cook County National Bank vs. United States, 107 U. S. 448, it is said:

"We consider that act as constituting by itself a complete system for the establishment and government of National banks prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; * * * their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed and their debts paid, or their property applied toward such payment. Everything essential to the formation of the banks, the issue, security and redemption of their notes, and winding up of the institutions, and the distribution of their effects, are fully provided for as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates."

In Leisy vs. Harden, 135 U. S. 100, the Court said:

"Where the subject matter requires a uniform system as between the States, the power authorizing is vested exclusively in congress, and canot be encroached upon by the States."

Farmers' National Bank vs. Dearing, 91 U. S. 29.

In this case the Court said:

"National banks organized under the National Banking Act are instruments designed to be used to aid the Government in the administration of an important branch of the government service. * * * Being such means brought into existence for this purpose, and intended to be so employed, the state can exercise no control over them nor in any wise affect their operation except in so far as

congress may see proper to permit. * * * It must be borne in mind that the constitution of the United States and the laws that shall be made in pursuance thereof *are the supreme law of the land, and that this law is as much a part of the law of each state and as binding upon its authorities and people as its own local constitution and law.*"

This court in reviewing the case of Easton vs. Iowa, 188 U. S. 220-239, considers the provisions and purposes of the National Banking Act, and concludes as follows:

"It thus appears that congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute."

The court further says:

"Our conclusions upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; that congress has directly dealt with the subject of insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports to be made of their condition, and by the power of visitation by federal officers; that it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government."

In the case of Zinn vs. Baxter, 65 Ohio St. 341, the court considering a similar case, it is said:

"But it is urged that at common law, and under the rules of equity, a shareholder may maintain an action

against the directors for such damage as he has individually sustained by reason of the wrongful acts of the directors, even though the same acts damnify all the stockholders in the same degree as they did him, and even though the corporation is a going concern, and has not been dissolved. The error of this contention lies in supposing that the statutes, the common law, and the rules of equity may well be invoked in the same case, and that where one may be found too narrow, the other may be called in to help out, and that the right of action is given partly by statute, partly by common law, and partly by the rules of equity. *The correct ruling is that, as congress has legislated upon the subject, and given and defined the right of action, the right thus given by congress is the only right, and that the action must be maintained under the act of congress or fail; and that the liability of the directors of a national bank is measured by that act alone, and cannot be enlarged or changed by the common law or rules of equity.*"

In the case of McCulloch vs. Maryland, 4 Wheat. 424, Chief Justice Marshall in considering the effect of a national law of Congress, regulating duties under such law, as compared with duties under a State law or the common law, used this language:

"There is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control. The States have no power, by taxation *or otherwise*, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

It will thus be seen that the liability of the directors provided for by Section 5239 are not only fixed and limited, but are exclusive under the law; and to permit recoveries from the directors, in pretended actions for deceit, would defeat the object and nullify the provisions of the law of

Congress under which the directors were acting in doing the things complained of.

III.

Since the judgment cannot be sustained on account of mismanagement of the bank, can it be sustained by reason of the facts alleged for deceit in the making of reports to the Comptroller of the Currency and having the same published in the newspapers as required by the National Banking Act?

If the judgment can be sustained on account of fraud and deceit in the making and publishing of the reports, can the directors who attested the reports be deprived of the protection given to them as directors of a national bank by section 5239 of the National Banking Act, which grounds their liability upon guilty knowledge of acts done in violation of said law?

The acts complained of were things done, or neglected to be done, by the directors in the execution of "their duties under the law as well as the by-laws of said bank," whereby the bank became insolvent and unable to pay its debts. The deceit complained of is alleged to have grown out of the alleged false statements attested by the directors in their official capacity as the directors of a national bank, and while acting as such directors in attesting, and the publication of the reports made by the managing officers of the bank to the Comptroller of the Currency.

The reports were made and attested as required by section 5211, Rev. Stat. U. S., being a part of the act governing national banks for the purpose of showing the condition of the bank. It was made the duty of the managing officers of the bank who prepared the reports to verify the

same by their oaths, and the law required that when thus made and verified, they should then be attested by three directors.

These actions are personal actions against the individual directors for damages growing out of their alleged violation of their duties under the law and the by-laws of a national bank.

By section 5239 of the National Banking Act the directors were made personally liable for damages sustained by the bank, or any other person where they "knowingly violated, or knowingly permitted" the officers to violate any of the provisions of the National Banking Act.

There is no dispute in these cases, of the fact that the statements complained of in the petitions were the reports made by the managing officers of the bank to the Comptroller of the Currency and attested by some of the directors. They were the national bank reports that were relied upon by the plaintiffs below; they were brought from the Comptroller's office and introduced by the plaintiffs as evidence in their cases. The plaintiffs produced H. J. Whitmore, an expert bank examiner, who testified that the statements introduced were the reports made to the Comptroller of the Currency and published in the newspapers.

On page 275 of the bill of exceptions he was asked and answered the following questions:

Q. "The statements that you have testified to, are the statements that are required to be made under the banking act of Congress to the Comptroller and published in the newspapers?"

"Mr. Thomas (attorney for the plaintiffs below): The plaintiffs object as calling for a conclusion, an opinion of the witness, not proper cross-examination, not the best

evidence, and it is an *attempt to inject a federal question* into the issues in these cases, and immaterial by what law, and by what authority it is required."

Objection overruled.

A. "They were such statements and reports."

This effort to evade the facts, makes plain the legal fraud attempted to be perpetrated in evading the law governing the liability of the defendants growing out of their official acts as directors of a National Bank as alleged by the plaintiffs. The protection of the law governing the liability of the defendants for acts done in their official capacity is a substantial right, and the "courts should be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

Justice Miller, in case of Arapahoe Co. vs. R. R. Co., 4 Dill. 277.

IV.

There were no other reports or statements, either verbal or written, made by any of the defendants on which these cases could be based.

It is true that it is alleged in the petitions that the plaintiffs had conversations with the defendants and that the defendants represented that the bank of whch they were directors was thoroughly sound, safe and solvent, but in the trial of the cases, *each one of the plaintiffs below denied that there were any such conversations or verbal representations.*

The evidence on this point by the Staplehurst bank is given by Jacobs, the President of the bank, on page 158 of the bill of exceptions.

The evidence of the plaintiff Bailey, to the same effect, will be found on page 175.

The evidence of Fritz Beckard the President of the Utica bank will be found on page 181 of the bill of exceptions.

Jones was President of the Jones National Bank, and on page 193 of the bill of exceptions he testified that the reports showing the condition of the Capital National Bank were published five times each year. And on page 194 he says, that "these statements were the principal thing that all business men relied upon; *that he had no other means of knowing the standing of the bank whatever,* any more than the names signed to the statements lend to a statement."

It is thus made clear that if an action for fraud and deceit can be maintained on the charges made by the plaintiffs against the directors, such charge of fraud and deceit is embodied in and based upon the reports that were made by the managing officers of the bank to the Comtroller of the Currency and attested by the directors.

The State Court concedes this fact, and accordingly held (page 55, Bailey Transcript):

"The officers of a national bank are personally liable for false reports made and published by them in pursuance of section 5211 Rev. Stat. U. S., to the party injured thereby, and the right of the injured party to maintain the action does not rest on the federal statute, but on the common law."

It will be noticed that the State Court is directly construing the National Banking Act, concerning the reports that were made *"in pursuance of section 5211,"* and holding the directors of a national bank personally liable in an action of deceit where such reports were attested honestly and in good faith, believing that they were true.

The State Court makes this construction in face of the

fact that the liability of the directors is fixed by section 5239 of said Act, only, where they knowingly violate," or "knowingly permit" the violation of some provisions of the National Banking Act.

If the National Banking Act applies to the official acts of the directors in attesting the reports to the Comptroller, made *in pursuance of said law,* and that by said law their liability is fixed and determined by their knowledge or want of knowledge of the falsity of such reports, then it seems to us clear that the construction put upon said federal law by the State Court is erroneous.

In determining the character of the act of the directors in attesting the reports prepared by the managing officers of the bank, it is well to consider the official process of making such reports and the manner of attesting the same.

The record shows that Mosher and Outcalt were the President and Cashier of the bank. They had acted in that capacity for a great many years. First for the Marsh National Bank, with which the defendants had no connection, and subsequently with the Capital National Bank. Both of these men stood high as financiers, and had been very successful for a period of about 14 years. They were implicitly trusted by people generally in Lincoln and in Nebraska. When these defendants became connected with the bank, a finance committee was appointed to look carefully after the loans and discounts. That committee consisted of two directors, Stuart and Holmes. This committee and the bank officers and clerks were trusted implicitly by these plaintiffs in error. As directors they were not required to be book-keepers or to possess the expert or technical knowledge of book-keeping usually adopted by the executive officers of a bank. When they attested the bank's reports they did it as the act of or-

dinary men, or men of ordinary and common intelligence. There were no personal representations made to the plaintiffs below, either in the reports or otherwise. The report simply consisted of a statement of the assets and liabilities. The amount of the assets balanced with the amount of the liabilities. There was no representation concerning the character of the assets and according to the statements from the bank's books the amount of the assets and liabilities were in every instance corectly stated. The only proof shown in the record in the trial of these cases affecting the reports, related to discrepancies between the reports and the bank's books. But they grew out of the fact that the reports had to be made on blanks furnished by the Comptroller of the Currency and the classification of the accounts of the bank to be stated in the reports was different from the classification in the bank's books. Some of the items under one heading in the books had to be placed under another in the report, in order to fit the classification indicated in the headings in the printed blanks furnshed by the Comptroller.

Yates, Thompson and Hamer trusted the managing officers of the bank the same as other business men trusted them, and when the bank failed these three directors lost more money on deposit in the bank than did any one of the plaintiffs below. So far as Mr. Thompson is concerned, he lost a far greater amount on deposit in the bank than did any other one concerned with this litigation. These three directors showed their honesty and good faith by the deposits of their own personal accounts.

In the case of Briggs vs. Spaulding, 141 U. S. 132, it is decided in substance, that directors of a national bank are not insurers of the fidelity of its agents whom they have appointed, and are not responsible for losses resulting from the wrongful act or omission of other directors

or agents unless the loss is a consequence of their own neglect of duty. They must exercise ordinary care and prudence; such degree of care as ordinarily prudent and diligent men would exercise. Knowledge of all the affairs of a bank, or what its books or papers show cannot be imputed to a director for the purpose of charging him with liability. The three directors for whom we appear were all busy men, at their own private business.

Mr. Thompson was superintendent of a railroad, and manager of a Gas Company, and other institutions, and much of the time was in poor health, and absent in Europe.

Mr. Yates was superintendent of a Telegraph line.

Mr. Hamer was a doctor in the active practice of medicine and surgery.

Thompson attested but one of the reports set out in the petitions, and but three others which dated back many years before the failure of the bank.

Dr. Hamer never attested any of the reports except one, and that was a report of date September 25, 1891, which is not one of the reports set out or relied upon in the plaintiff's petitions.

It has been held that a director who did not attest a report relied upon for cause of action, cannot be held *personally* liable for anything stated in such report. Pier vs. Hammond, 86 N. Y. 95; Gerner vs. Mosher, 58 Nebr. 145.

In the latter case the court said:

"The corporation may be bound by the act of its constituted officers, but when it is sought to charge officers *individually* for *ultra vires* acts, or for misconduct, it is

only those who participated therein who are liable, in the absence of course, of conspiracy or indirect participation, which was here not only unproved, but was affirmatively disproved. As to Thompson, Stuart, Phillips and Hamer, it follows that the judgment must be affirmed."

(The judgment below was in favor of all of the defendants.)

And yet in the trial of the cases under consideration, the court instructed the jury, page 27 of the Bailey transcript, that if a director was in town and able to be about when the report was made, that fact could be considered by the jury in determining his knowledge of fraud, as follow

"13th. And although you should find from the testimony that any particular director or officer of said bank did not himself directly cause to be issued and published the statements concerning the condition of said bank, yet if you should find that at the time such statements were being published in the public press, such director or officer was a resident of the City of Lincoln, was in a condition of health to be about, giving his ordnary attention to business, and was not absent from home, that is absent from the city of Lincoln, such facts should be taken into consideration by you, together with the other evidence and circumstances in the case in determining whether or not that officer or director knew of and participated in the issuance and publication of any or all of the statements of the condition of said bank."

The highest court of that state approved this instruction by affirming the judgment of the trial court.

That court went further, and held, page —:

"It is no defense to an action of that character (deceit) that such reports were made and published by the officers without knowledge of their falsity. * * * and the fact that they made and published them without knowledge of their falsity is no defense."

This holding utterly ignores the protection of section

5239 of the National Banking Act, making the directors personally liable only where they "knowingly violate or knowingly permit any officers of the bank" to violate the provisions of the Act

It is held in the case of McDonald vs. Williams, 174 U. S., at 406:

"One is not usually said to permit an act which he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge."

There is no reason of public morals or private security that demands such a rule or construction, and the reputation of honorable men should not be lightly smirched with a charge of deceitfulness and wrong doing without any pretense of proof. The words "knowingly permit" ought not to be tortured out of their plain and ordinary meaning, which happens also to be their technical etymological signification, as evidently intended and used by congress. They are not synonymous with "suffer" or "allow," but express a positive acquiesence. One cannot positively acquiesce in anything of the very existence of which he is ignorant. It cannot therefore be truthfully contended that a director, whose personal innocence is admitted or shown by the proof, knowingly permitted the making and publishing of the alleged false reports.

The Supreme Court of the State of Ohio held:

"The directors of a bank are not held as a matter of law to know all its affairs or what its books and papers would show, and such knowledge cannot be imputed to them for the purpose of charging them with liability."

Mason vs. Moore, 73 O. St. 275.

Again on page 290:

"They were not required to be book-keepers or to possess

the expert or technical knowledge of book-keeping usually adopted by the executive officers of such association. When they attested the bank's reports they did it as the act of ordinary men, or men of common or ordinary intelligence. The reports had two purposes; primarily to inform the Comptroller of the condition of the bank as to its resources and liabilities, and its publication is for the information of the stockholders and the general public. There were no personal representations made to the plaintiff."

We have heretofore shown that in the decision under consideration, the state court held that the officers of a national bank are personally liable for false reports made and published by them in pursuance of section 5211 of the National Banking Act.

And it also appears from the evidence, without any dispute, that the reports complained of were the reports made in pursuance of section 5211, and that there were no other statements, verbal or written, on which these causes of action are based.

When the state court held that the defendant directors were liable to the plaintiffs who had deposited their money in the bank, for alleged false statements in the reports to the Comptroller without *knowing* or *having knowledge* of the falsity of such reports, such holding is in direct conflict with the personal liability imposed upon the directors by section 5239 of said Act.

But the state courts are as firmly bound by the laws of congress as are the Federal courts.

It was held by this court in Farmer's National Bank vs. Dearing, 91 U. S. 29, that:

"It must be borne in mind that the Constitution of the United States and the laws that shall be made in pursu-

ance thereof, are the supreme law of the land and that this law is as much a part of the law of each state and as binding upon its authorities and people, as its own local constitution and laws."

It is further held by this court in the case of Robb vs. Connelley, 88 U. S. 637, that:

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard enforce and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.' If they fail therein, and withhold or deny any rights, privileges, or immunities secured by the constitution and the laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided, to this court for final conclusion and determination."

The State Court holds in an action for fraud and deceit based upon the reports to the Comptroller of the Currency, that the liability of the directors by attesting such reports, is governed by the rule of the *common law*, instead of by the federal statute, in pursuance of which such reports were made; and that under the common law the directors would be held liable in an action for deceit even though they were honest, and acted in good faith, and believed the reports to be true and correct.

We contend that the State Court erred, not alone in denying to the directors the protection of the federal law in pursuance of which the reports were made, which law imposed liability upon the directors only where they

knowingly violated the provisions of said law, but also in holding that at common law *scienter* is not a necessary element in an action for fraud and deceit.

The common law is in full force and effect in Nebraska and has been since before its organization as a State. While yet a territory the legislature passed an act as follows: (Compiled Statutes of Nebraska)

"1934. So much of the common law of England as is applicable, and not inconsistent with the constitution of the United States, with the organic law of this Territory or with any law passed or to be passed by the legislature of this Territory is adopted and declared to be law within said Territory." Sec. 1934, Ch. 15a, page 501, Annotated Statutes 1903.

No law has been passed in Nebraska conflicting with this provision and it is recognized and enforced by numerous decisions of the highest court of the State.

It was clear to the State Court in deciding these cases that the plaintiffs in their individual capacity could not recover judgment against the directors for mismanagement of the bank, as such damages were an asset of the bank recoverable only by the bank or its receiver.

It was further made clear to the court that no recovery could be had against the directors for deceit, if section 5239 governed their liability, because there was no proof of fraud or any knowledge of the falsity of the reports.

And it was further made clear to the State Court that no recovery could be had against the directors at common law unless the court should hold that *scienter* was not a necessary element in an action for fraud and deceit. There were no facts showing any fraud or knowledge on the part of the directors that the reports were false. The Court in its opinion said:

"We do not wish to be understood to say that all of the defendants knew that such statements were false; we are satisfied that such is not the case, but as was said in Gerner vs. Mosher, 58 Neb. 135, it was their duty to know whether the statements made by them were true, and the fact that they made and published them without knowledge of their falsity is no defense."

The logical result left no ground upon which the directors could be held liable, except by overturning the rule of liability as prescribed in the National Banking Act, as well as the long established rule of the common law, that *scienter* is a necessary element of recovery in an action for fraud and deceit.

The proposition that the directors could be guilty of fraud and deceit without knowing of any fraud, and while innocent of any purpose to deceive, is so subversive of the fundamental principles of law and justice between men, as to at once challenge the correctness of the court's decision. No principle of law is better established, recognized and enforced than that all men are presumed to be innocent until proven guilty.

One of the early decisions establishing the common law rule on *scienter* is the case of Derry vs. Peek, 14 App. Cs. 337. Lord Watson (at page 345), speaking of the opinion of the Judges of the Court of Appeal, said:

"They seem to have held that a man who makes a representation with a view of its being acted upon in the honest belief that it is true, commits a fraud in the eye of the law, if the court or jury shall be of opinion that he had no reasonable grounds for his belief. I have no hesitation in rejecting that doctrine for which I can find no warrant in the law of England."

Lord Bramwell (page 347) after stating that a misstatement of a fact honestly made may constitute *equitable*

ground for rescinding a contract, holds that to found an action for damages there must be fraud:

"The statement of claim in this case states fraud. Of course that need not be proved merely because it is stated. But no one ever heard of or saw a statement of claim or declaration for deceit without it. There is not an authority at common law, or by a common law lawyer to the contrary; none has been cited, though there may be some incautious, hesitating expressions which point that way."

Lord Herschell (at page 367), quotes from an authority as follows:

"It is insisted that even that (the gross negligence which the jury had found) accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be *fraudulently made*. But then it was said in order to constitute that fraud it was not necessary to show that the defendants *knew* the fact they stated to be untrue, that it was enough that the fact *was* untrue if they communicated that fact for a deceitful purpose, and to that proposition the court is prepared to assent. It is not necessary to show that the defendants *knew* the fact they stated to be untrue. If they stated a fact which was untrue *for a fraudulent purpose*, they at the same *not believing* that fact to be true, in that case it would be both a legal and moral fraud."

Lord Herschell said of this:

"Now it is impossible to conceive a more emphatic declaration than this, that to support an action of deceit, fraud must be proved, and that nothing less than fraud will do."

At page 375, Lord Herschell further said:

"In my opinion making a false statement through want of care, falls far short of, and is a very different thing

from fraud, and the same may be said of a false representation honestly believed through insufficient grounds."

In Kountze vs. Kennedy, 147 N. Y. 124, the court recognizing this well established principle said:

"The principle has been obscured by the use by judges of the phrase 'legal fraud,' which has sometimes been interpreted as meaning fraud by construction, and so indicating that something less than actual fraud may sustain an action for deceit. The gravamen of the action is actual fraud, and nothing less will sustain it."

Pomeroy in his second volume on equity jurisprudence, section 884, states the rule as follows:

"It is now a settled doctrine of the law that there can be no fraud, misrepresentation or concealment without some *moral* delinquency; there is no actual fraud, *legal* fraud which is not also a moral fraud. This immoral element consists in the necessarily guilty knowledge and consequent intent to deceive—sometimes designated by the technical term, *scienter*. The very essence of the legal conception is the fraudulent intention flowing from the guilty knowledge. No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge to the party at the time he makes it."

In the case of Lord vs. Goddard, 13 How. 211, it is held:

"The gist of the action is fraud in the defendants and damage to the plaintiff. Fraud means an intention to deceive. If there was no such intention; if the party honestly gives his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue: * * * The simple fact of making the representations which turn out not to be true, unconnected with a fraudulent design, is not sufficient."

In Warfield vs. Clark, (Ia.) 91 N. W. Rep. 833-4, it is held:

"That in an action against the Secretary of an insurance company for deceit consisting of false representations contained in its official statement, an instruction that defendant was charged with knowledge of the true condition of the company, and if the statement filed by him was not correct, it was untrue and false, and so known to be by the defendant, was erroneous, since the action could be maintained only on proof of *active, conscious and intentional fraud.*"

In the case of Runge vs. Brown, 23 Neb. 817, it is held:

"In order to maintain an action for deceit, it is not only necessary to establish the telling of an untruth, *knowing it to be such*, but it is equally necessary that it be shown that the plaintiff had a right to rely, and did rely, upon the representations made, and that he altered his condition in consequence thereof, and suffered damages thereby."

It is true that the Nebraska court held at a later time, in the case of Gerner vs. Mosher, 58 Nebr. 135, by a divided court, that proof of scienter is not necessary to the recovery in an action for deceit; but we think that this decision is against the great weight of authority, both federal and state, and stands almost alone among the decisions of the United States.

V.

There is no ground on which the State Court's decision can be sustained independently of the Federal question, and the rights and liabilities created by the National Banking Act.

There is no statement nor representation made for the basis of the action for deceit other than the reports made to the Comptroller of the Currency in pursuance of sec-

tion 5211 of the National Banking Act, and in attesting these reports the directors acted in their official capacity as directors of a national bank duly organized under the national banking law.

If the attesting of such reports furnished the basis of an action for fraud and deceit, then the act of the directors in thus attesting the reports must be judged by the law in pursuance of which the reports were made. Their liability depends upon their guilty knowledge of the violation of said law. The case made shows conclusively and without any dispute that the directors were innocent of any fraud, deceit or guilty knowledge. On the question whether they knew the reports attested were false the state court said:

"We are satisfied that such is not the case, but it was their duty to know whether the statements made by them were true and the fact that they made and published them without knowledge of their falsity, is no defense."

In thus holding that court denied to the directors the protection given them by the law under which, and in obedience to which they acted in attesting the reports. To reach such a decision that court either had to ignore the federal banking law or decide the case directly contrary to its provisions.

The liability of the directors for deceit without knowledge is so violative of the liability imposed by section 5239, that it seems impossible that congress contemplated any such liability in the passage of the National Banking Act.

The State court in its decision (page 59 of the Bailey transcript), in considering the character of the suits, said:

"It is true, the petitions show misfeasance and mismanagement on the part of the defendants, as officers of the bank, and, that the bank thereby sustained damages, but

they show more than that. They show that the defendants made and published false and misleading statements concerning the financial condition of the bank, whereby the plaintiffs were induced to become and remain its creditors to their damage. In short, whatever other allegations may be contained in the petition, they also contain sufficient to constitute a common law action for deceit. That the party, upon whom the deceit or imposition was practiced by the officers of a national bank, may maintain an action against them in his own name and behalf for damages resulting to him therefrom, and that his right of action does not rest on the federal statutes but the common law, is no longer an open question."

But the jurisdiction of this court is not defeated by an arbitrary statement by the state court in its decision that no federal question is involved, and that its decision is based upon the common law independent of the federal statutes. As we understand the law, in determining the jurisdiction of this court, it will look to the issues joined between the parties, and the trial of the questions at issue in the case, to determine whether any federal right or immunity specially set up or claimed, has been denied, and will not be governed by the assertion of the state court that no federal question is involved in the decision, nor by the assumed *intentions* of the pleader in alleging his cause of action.

In the case of Chicago R. R. Co. v. Illinois, 200 U. S. 562 at 580, this court held that its jurisdiction is not defeated by the fact that the state court in its judgment necessarily denied the fact of the federal right involved, where, if the federal right or immunity specially set up has been recognized and enforced, and a different judgment should have been entered from one that rested solely upon some local or general law. And, further that the necessary result could not be avoided by the state court,

merely by silence on the federal question, or by giving as a reason, in its judgment, some principle of common law.

It will be noticed that the state court did construe the federal law relied upon by the defendants as a defense, but as we contend erroneously held that the federal law did not apply, but that the issues joined were governed by the rule of the common law.

In the case of M. K. & T. Ry. Co. vs. Elliott, 184 U. S. 533, speaking of this question, the court said:

"The fact that the state court, whilst deciding the federal question, erroneously held that it was not a federal one, does not take the case out of the rule that, where a federal question has been decided below, jurisdiction exists to review. The result of the contrary doctrine would be this, that no case where the question of federal right had been actually decided could be reviewed here if the state court, in passing upon the question, had also decided that it was non-federal in its character."

VI.

Former Adjudication.

In the case brought by Thomas Bailey in Seward County the defendants pleaded a former adjudication of the same cause of action in the case first brought by Bailey in Lancaster County District Court.

The petition filed by Bailey in the Lancaster County case will be found on page 258, bill exceptions.

To this petition the defendant Yates, Hamer and other directors, filed a demurrer for the reason that on the facts alleged, the plaintiff in his individual capacity was not entitled to recover; that the plaintiff was not a proper party to recover the damages sued for; and the petition

does not state facts sufficient to constitute a cause of action in favor of plaintiff against the defendants. The demurrer will be found on page 273 of the bill exceptions.

Subsequently that case was removed to the federal court, motion to remand overruled, the demurrer ruled on and sustained, and the cause of action dismissed with judgment against the plaintiff for costs. The record of such judgment and entry will be found on pages 255-257, of the bill of exceptions.

That judgment was never set aside, vacated, nor appealed from, and stands and remains in full force and effect. It is found on page 256 of the bill of exceptions, as follows:

"And whereas, in the present term of May in the year of our Lord one thousand eight hundred and ninety-four the said cause came on to be heard before the said United States Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

"On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause, be and the same is hereby affirmed with costs; and that Charles W. Mosher, Homer P. Hamer, Rolla O. Phillips, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart and Richard C. Outcalt recover against Thomas Bailey the sum of twenty dollars for their costs herein and have execution therefor."

The state Supreme Court in its decision now under consideration refused to give full faith and credit to this judgment, and refused to recognize it as an adjudication of the cause of action as set forth in the Bailey case now under consideration. The assignment of error on this point will be found on page 72 of the transcript in the Bailey case, as follows:

"16. The court has erred in deciding that the judgment

of dismissal entered by the Circuit Court of the United States for the District of Nebraska, on February 9, 1894, in an action then and there pending in which the defendant in eror herein was plaintiff, and the plaitiffs in error herein were defendants, which judgment was affirmed by the Circuit Court of Appeals, reported in 65 Federal Reporter 488, which judgment was entered upon the same cause of action, and for the same right to recover as is asserted in this case, is not a bar to this action, and an adjudication of the rights between the parties to the judgment herein; and in refusing to give full faith and credit to said judgment of the Circuit Court of the United States for the District of Nebraska, in violation of the provisions of the constitution of the United States, Article 4, Section 1."

If the causes of action set forth in the first and second suits brought by Bailey are in effect, the same, then the decision of the state court is essentially wrong on the question of res judicata. The only difference in the two cases relates to legal conclusions, and not to the right claimed nor the remedy sought to be enforced.

In the first, it was alleged that "the Capital National Bank was organized under the laws of the United States."

In the second, that "the Capital National Bank was duly organized," which must necessarily mean, under the national banking law. Walker v. Windsor, 56 Fed. Rep. 80.

In the first, the statements complained of were made in "pursuance of the banking laws of the United States, and on the demand of, and to the Comptroller of the Currency."

In the second, it is alleged that "it was the duty of the defendants under the law as well as the by-laws of the bank" to make true and correct statements.

In the first, it is alleged that "by reason of the several

violations of the banking law as above set forth "these defendants had become liable to the plaintiff for damages.

In the second, it is alleged that the damages claimed resulted "by reason of the facts as above set forth, and the false and fraudulent statements."

But beyond the matter of pleading, the identity of the cause of action is plain in this litigation, and was recognized by the State court in its decision, that the same wrongs and violation of duties, the same alleged right to recover, and the same representations in the national bank statements, are asserted by the plaintiff in the first case which went to judgment, as in the latter action now under consideration.

The State court holds in its decision that the two different petitions are substantially the same, but tries to draw a distinction on account of legal conclusions alleged. In the opinion it is said:

"The petitions in the latter cases as they stood at the time of the trial are substantially the same as those in the former, save that it is not alleged in the latter that the Capital National Bank was organized under the laws of the United States, nor that the statements therein mentioned purporting to show the financial condition of said bank were made in pursuance of the banking laws of the United States or on the demand of the Comptroller of the Currency."

We have already shown that the Capital National Bank could not be duly organized under any other law than that of the National Banking Act.

We have also shown by the record that the statements mentioned in the latter petitions were the reports that were made to the Comptroller of the Currency in pursu-

ance of the banking laws of the United States, and no other statements of any kind were made.

Such fact is conceded by the State Court in its decision where it holds:

"The officers of a national bank are personally liable for false reports made and published by them in pursuance of section 5211 Rev. Stat. U. S., to the party injured thereby."

The record shows without dispute that these reports were identically the same in both actions, and that the court in the first action sustained a demurrer filed to the petition and dismissed the cause of action, from which no appeal was ever taken, and the adjudication of that question still stands in full force and effect, whether it was a correct decision or not.

So that whatever cause of action the plaintiff Bailey had in the first petition, he alleged and presented in the second. The questions of mismanagement, fraud and deceit were all jumbled together, and the allegation of facts being the same, or substantially the same, as in the latter cases every point which properly belonged to the subject of the allegations would be covered by the adjudication, without regard to the conclusions alleged by the pleader.

In the case of Gould vs. Evansville R. R. Co., 91 U. S. 533, this court speaking of a similar question, said:

"Except in special cases, the plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation, and which the parties, exercising reasonable diligence, might have brought forward at the time. 2 Taylor's Ev., sect. 1513; Henderson vs. Henderson, 3 Hare, 115; Stafford vs. Clark, 2 Bing. 382; Miller vs.

Covert, 1 Wend. 487; Bagot vs. Williams, 3 B. & C. 241; Roberts vs. Heine, 27 Ala. 678."

In the State Court's decision, speaking of the final judgment in the first case brought by Bailey (page 61, Bailey transcript), it is said:

"It does not dispose of the action for deceit on its merits, but on the technical ground that by the averment of mere conclusions of law the plaintiff had committed himself to the theory that the action was of a different character and precluded an examination of the merits of his action for deceit."

If, as we have shown, and which seems to be conceded, the first and second causes of action brought by Bailey were in fact the same, then the sustaining of the demurrer in the first case had the same effect as an adjudication, as a trial had before a jury and a judgment rendered by the court. Admission by the demurrer of all the facts pleaded, had the same effect as an admission by the testimony in a trial.

In the Gould case, at 533 it is said:

"Decided cases may be found in which it is questioned whether a former judgment can be a bar to a subsequent action, even for the same cause, if it appears that the first judgment was rendered on demurrer; but it is settled law, that it makes no difference in principle whether the facts upon which the court proceeded were proved by competent evidence, or whether they were admitted by the parties; and that the admission, even by way of demurrer to a pleading in which the facts are alleged, is just as available to the opposite party as if the admission was made *ore tenus* before a jury. Bouchard vs. Dias, 3 Den. 244; Aurora City vs. West, 7 Wall. 99; Goodrich vs. The City, 5 id. 573; Beloit vs. Morgan, 7 id. 107; Perkins vs. Moore, 16 Ala. 17; Robinson vs. Howard, 5 Cal. 428."

In this case at 534 this court further said:

"Different forms of expression, it may be conceded, are used, in several instances, in the declaration in the last suit, from those employed in the complaint exhibited in the former suit; but the substance and legal effect of the two pleadings, in the judgment of the court, are the same in all material respects. Even without any explanation, it is so apparent that the first and second alleged differences in the two pleadings are unsubstantial, that the objections may be passed over without further remark."

In the last case brought by Bailey some words, sentences, and conclusions of law were left out of the petition, which words and conclusions were contained in the petition in the first case. But there was no new averment or statement of any different fact in the petition in the last case from what had been stated in the petition in the first case.

In the Gould case, *supra* (at page 535), it is said:

"Tested by these considerations, it is clear that the proposition that the defects, if any, in the declaration in the former suit were supplied by new allegations in the present suit, is not supported by a comparison of the two pleadings. Should it be suggested that the demurrer admits the proposition, the answer to the suggestion is, that the demurrer admits only the facts which are well pleaded; that it does not admit the accuracy of an alleged construction of an instrument when the instrument is set forth in the record, if the alleged construction is not supported by the terms of the instrument. Ford vs. Peering, 1 Ves. Jr. 78; Lea vs. Robeson, 12 Gray, 280; Redmond vs. Dickerson, 1 Stockt. 507; Green vs. Dodge, 1 Ham. 80.

Mere averments of a legal conclusion are not admitted by a demurrer unless the facts and circumstances set forth are sufficient to sustain the allegation. Nesbit vs. Berridge, 8 Law Times, N. S. 76; Murray vs. Clarenden, Law Rep. 9 Eq. 11; Story's Eq. Plead. 254b; Ellis vs. Coleman, 25 Beav. 662; Dillon vs. Barnard, 21 Wall. 430."

In conclusion, we contend:

1st. That the state court, in the decision under consideration, has erred in holding that the causes of action in these four cases are not for misfeasance and mismanagement of a national bank by its officers and directors.

2d. That the judgment is in violation of article VI, section 2 of the constitution of the United States making the laws enacted in pursuance thereof the supreme law of the land, binding upon all the courts both state and federal.

3d. It has denied to the defendants the protection of the federal law under and in pursuance of which they acted in doing the things complained of.

4th. It has found the defendants guilty of fraud and deceit in the attesting of reports to the Comptroller of the Currency when they had no knowledge of such fraud and deceit, contrary to the provisions of section 5239 of the Banking Act, by reason of which Act such reports were attested.

5th. The court erred in enforcing a liability imposed upon the defendants by a so-called common law action for deceit, for official acts of the directors of a national bank, done in pursuance of the requirements of the National Banking Act, for which things done as charged, said Act fixed a liability which is exclusive of any common law liability.

6th. In the Bailey case the state court has failed to give due faith and credit to a former judgment of the United States court adjudicating the same cause of action between the same parties, in violation of article IV. section 1 of the constitution of the United States.

Respectfully submitted,

J. W. DEWEESE AND
FRANK E. BISHOP,
Attorneys for Plaintiffs in Error.

FILE COPY.

Supreme Court,
FILED.
FEB 5 1907
JAMES H. McKENN

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 230.

CHARLES E. YATES ET AL., PLAINTIFFS IN ERROR,

vs.

JONES NATIONAL BANK.

No. 233.

CHARLES E. YATES ET AL., PLAINTIFFS IN ERROR,

vs.

BANK OF STAPLEHURST.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR THOMPSON.

HALLECK F. ROSE,
Of Counsel for David E. Thompson,
Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24402

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF FOR PLAINTIFF IN ERROR, DAVID E. THOMPSON.

Statement of the Case.

It is shown in the brief of Messrs. Deweese and Bishop in behalf of all the plaintiffs in error (except Mosher and Outcalt) that the amended petition, on which the cause was tried, stated, or pretended to state, a cause of action for malad-

ministration against the directors of a national banking association. In the State Supreme Court, however, the case was disposed of upon the theory that the petition stated a common-law cause of action for *deceit,* based on false statements of the resources and liabilities of the bank appearing in official reports made to the Comptroller of the Currency. This supplemental statement is intended to embody sufficient of the record to show that defendant *David E. Thompson* presented and litigated in the State courts the issue that *scienter* is an essential element of the cause of action for deceit based upon official acts of national bank directors, made so by the express terms of section 5239 of the Revised Statutes of the United States, and that the State Supreme Court actually adjudged the issue adversely to *Mr. Thompson.* We join in the argument of Messrs. Deweese and Bishop and count upon all the points urged in their brief for plaintiffs in error; but, if the court should be of opinion that the statute subjects directors to common-law liabilities, and to common-law remedies for their enforcement, it is still obvious that section 5239 (Rev. Stat. U. S.), creating such liabilities, in terms narrows and restricts their application to the wrongful acts of the directors done *knowingly* and *willfully.* This point, if meritorious, will, in the case of *Mr. Thompson,* be fatal to the judgment of the State court, even if the general doctrine at its foundation—that the case presents simply the common-law cause of deceit—is approved.

In the case of *Mr. Thompson,* and any of the other directors shown to have had *no knowledge* of any falsity in the published reports, and to have had no intent, purpose, or motive to mislead, deceive, or defraud the depositors or others, there is this meritorious complaint against the judgment of the State court, thus based on section 5239 of the Revised Statutes of the United States, which may not be urged in behalf of Mosher and Outcalt. The latter were the executive officers, in direct administrative control of the bank, and directed and controlled both the financial opera-

tions and the books of account of the association. It is their alleged wrongs that are at the foundation of these suits, and necessarily they had knowledge of their own acts. But, as we shall hereafter show, *Mr. Thompson* was not only wholly without knowledge of the alleged false statements and acts of maladministration charged in the petitions, but was, to a greater extent than any of the complaining depositors, a victim of and a pecuniary loser therefrom. In stating this point it is necessary to exhibit the grounds and theory upon which the judgment of the State court rests.*

The third point of the syllabus of the opinion (prepared by the court) states a rule necessary to maintenance of the judgment as follows (printed Record, p. 87):

"3. It is no defense to an action of that character (for publishing false reports) that such reports were made and published by the officers without knowledge of their falsity. Following *Gerner v. Mosher,* 58 Neb., 135."

Turning to the original authority, which was merely followed and applied to this suit, we find the rule applied to be thus stated in the opinion by NORVAL, J., in *Gerner v. Mosher,* 58 Neb., 156:

"In our view, whether the attesting directors possessed knowledge of the falsity of their reports is *wholly immaterial.* * * * That they were innocent of the true situation or condition of the affairs of the bank, is wholly an unimportant consideration, since *proof of a scienter is not necessary to a recovery.* This court has frequently asserted that to maintain an action for false representations it is not essential that it be shown they were intentionally or *knowingly* [the precise term employed in sec. 5239, Rev. St. U. S.] made by

*NOTE.—The record references are to case No. 230, *Yates v. Jones National Bank.* In the other case submitted upon this brief, No. 233, *Yates v. Bank of Staplehurst,* the pleadings of Mr. Thompson are identical, in form and substance, with those in the former case. The two cases were tried together, and heard together in the Nebraska Supreme Court on the same bill of exceptions. The questions presented in the two cases are in all respects identical.

the defendant. This is the rule in ordinary causes, and no valid reason can be suggested or pointed out why the same principle should not apply in actions for deceit against the directors of a banking corporation."

Thus the State court, while exercising authority upon the assumption that the National Banking Act, by its own terms (sec. 5239, Rev. Stat. U. S.), subjects bank directors to common-law liability for *deceit* declines to be bound by the limitations of the act which, it is claimed, adopts the common-law action, but in terms makes *scienter* an *indispensable* element.

Recurring to the present record, we find an express holding in the court's opinion (by the State law made part of the record) that some of the defendants *did not know* that the statements complained of were false. We quote from the opinion (printed Record, p. 94):

"We do not wish to be understood to say all the defendants knew that such statements were false; *we are satisfied that such is not the case.* But, as was said in *Gerner v. Mosher,* 58 Neb., 135, it was their duty to know whether the statements made by them were true, and the fact that they made and published them, without knowledge of their falsity, is no defense."

It is thus demonstrated that the judgment against *Mr. Thompson,* and any other directors in like situation, rests essentially and necessarily upon the right to exclude *scienter* from the elements of the cause. Upon this rule, thus shown to have been applied, and which was embodied in the charge given to the jury, a general verdict does not include an adverse finding on the element of *scienter;* and the holding of the opinion of the State Supreme Court is that such finding could not be sustained, upon the evidence in the record, against all of the defendants.

The ninth instruction given by the trial judge, to which defendants excepted (printed Record, pp. 30-31), was as follows:

"9th. Bank officers or directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages by one depositing money in such bank in reliance upon the false representation of the condition of the bank contained in the report, *even though such director or officer did not know that his report so published was in fact false or untrue.*"

The answer of *Mr. Thompson* (printed Record, p. 19) distinctly averred that his duties and liabilities in respect to the matters charged in the petition were defined and controlled by the National Banking Act; in his motion for a new trial, addressed to the trial court, he assigned (printed Record, p. 50):

"7th. The verdict is contrary to law.
"8th. The verdict is contrary to the evidence and is not supported by sufficient evidence.
"9th. The court erred in refusing to give instruction numbered 1, requested by this defendant."

The answer of Mr. Thompson to the amended petition, found in original transcript in Jones National Bank suit, at page 225, is in the same form as that appearing in the printed record in case No. 233, *Yates v. Bank of Staplehurst,* pages 18 and 19. The answer to the amended petition, in asserting the paramount and controlling force of the act of Congress, alleges (printed record in No. 233, case of *Bank of Staplehurst,* pp. 18, 19):

"This defendant for himself alleges that the Capital National Bank of Lincoln referred to in said amended petition, was organized and had its existence under and by virtue of the National Banking Act passed and approved by the Congress of the United States. That Homan J. Walsh was the vice-president of said bank and Richard C. Outcalt was the cashier of said bank, and that each of the other defendants was a director of said bank, and the defendant David E. Thompson was a director for a short time in said bank, but was not such director at the time any of the deposits were al-

leged to have been made by the plaintiff in the Capital National Bank, and during such time he was simply a stockholder in said bank. That said bank was closed by the national bank examiner on or about the 23rd day of January, 1893, and that soon after said date a receiver was duly appointed by the Comptroller of the Currency to take charge of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment. That no forfeiture of the franchises of the said banking association has ever been declared by the Comptroller of the Currency or adjudged by any court, for the reason of the violation of the National Banking Act by the directors and officers of said bank, or for any other reason. That the duties and obligations of the directors and stockholders of said bank were such and only such as were required by the National Banking Act under which said bank was organized and existing. This defendant denies that he made, signed or attested the report purporting to show the condition of said bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

"The defendant further says that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true, constitute a violation by this defendant as a director or stockholder, of his duties as such director or stockholder as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And this defendant alleges that if any liability attaches to him as a director or stockholder of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the National Banking Act concerning the management of national banks; and that in determining the liability of this defendant, there is necessarily involved the construction of said National Banking Act relating to the duties of directors and stockholders of national banks."

While the answers distinctly asserted the controlling force of the Congressional Legislation, it must be conceded that even that formality of pleading was not essential. By force

of the National Constitution that instrument and the acts of Congress enacted pursuant thereto are the supreme law of the land. As such they are, in effect, constituent parts of the public law of each State, binding on all the State courts, and judicial knowledge thereof is enforced upon the State courts.

At the trial defendant *Thompson,* in his own behalf, requested an instruction, numbered 1, as follows (printed Record, p. 43):

"You are instructed that under the issues in this case, and the evidence that has been adduced on the trial thereof, the plaintiff is not entitled to recover a verdict against the defendant David E. Thompson; and you are, therefore, instructed to return a verdict in favor of said defendant David E. Thompson. REFUSED. EXCEPTED TO BY DEF'T THOMPSON. J. W. D. S. H. SORNBERGER, JUDGE."

Upon the foundation thus laid in the trial court, the petition in error, addressed to the State Supreme Court by *Mr. Thompson* (printed Record, p. 7), assigned the following as one ground of error:

"3rd. The court erred in refusing to give the first paragraph of the instructions requested by this plaintiff in error, defendant below, for the court to direct the jury to return a verdict in favor of the defendant below, being numbered 1, and found in the transcript on page 69." (Reference is to State record paging.)

The portions of the record exhibited show that the question, whether *scienter* is an essential element of the cause of action for *deceit,* arising here upon the act of Congress (sec. 5239, Rev. Stat. U. S.), was distinctly litigated in the trial court, was presented to the State Supreme Court for review in such form that it was necessarily included in its judgment of affirmance, and was actually discussed and passed upon in the opinion, which distinctly held the evidence sufficient, notwithstanding it found *Mr. Thompson* had no knowledge of the falsity of the statements at the foundation of the suit, because *scienter* was not an element of the cause of action. The

same point is now presented, by the petition in error, to this court (printed Record, p. 102), upon the following

Assignments of Error.

"7. The court has erred in deciding that the fact that those plaintiffs in error, who were directors, were without knowledge of any falsity of the reports attested by them, or some of them, mentioned in the petition, was immaterial, and that such directors, or any of them, were liable under the proofs showing that they were without knowledge of the falsity of such reports; the said decision is in violation of the provisions of section 5239 of the Revised Statutes of the United States, which makes liability of the directors dependent upon the fact that they *knowingly violated,* or *knowingly permitted* the violation of the provisions of the National Banking Act, and participated in or assented to *such* violation.

"8. The court has erred in deciding that a common-law action of deceit, based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by directors of such bank, can be maintained against such directors, without knowledge of any false statements in such reports, and without any participation in or assent to any violation of the National Banking Act, as essential elements of the cause of action, as required by section 5239 of the Revised Statutes of the United States."

I.

Scienter is, by the common law and by the express terms of section 5239, Revised Statutes of the United States, a necessary and indispensable element of the cause of action for deceit against national bank directors, founded on official reports made to the Comptroller of the Currency.

The holding of the State courts that knowledge of the alleged falsehoods is immaterial, and that scienter is not an element of the cause of action, is the sole support of the judgment against Thompson. This holding of the State courts is plainly violative of section 5239, Revised Statutes of the United States.

There was no attempt to prove that Mr. Thompson personally solicited any deposit from plaintiff, made any personal representations, or participated directly in the business of plaintiff with the Capital National Bank.

H. I. JONES, president of *Jones National Bank*, was the sole witness adduced to show its reliance upon the official statements. He testified (printed Record, p. 194): "Their statements were the principal thing that all business men rely upon. That is what they are made for." He was then asked, "Had you any other means of information than the statements?" to which he answered, "No other means as to the standing of the bank whatever, any more than the names signed to the statements lend to a statement." His testimony thus definitely excludes any personal participation by Mr. Thompson in the business dealings between the two banks.

E. JACOBS, president of the *Bank of Staplehurst*, was the sole witness questioned to show the reliance of that bank upon the official statements. At page 158, printed Record, Jacobs

was asked to name the persons he understood to be the directors of the Capital National Bank, and testified: "A. There was Thompson, Stuart, Yates, Hamer, and I believe Holmes. Q. Did you know any of these men personally? A. No, sir. Q. Had no acquaintance with any of them? A. No acquaintance at all with any of them." So the testimony, offered by both of the banks that sued Mr. Thompson, shows definitely that he did not personally participate in their dealings had with the Capital National Bank. That fact must, therefore, be conceded to be established and not the subject of contention or dispute.

There is no proof that Mr. Thompson had any knowledge that the representations made the basis of the suit were false or untrue in any particular, nor that his knowledge and information gained through his office of director did not indicate to him, as a man of ordinary prudence and business capacity, that the statements were true, nor that they were not attested in good faith upon supposedly creditable information of their absolute verity. While these elements, which we deem necessary to make out a cause of action on any theory in favor of plaintiff, were not covered by any proofs adduced by plaintiff, Mr. Thompson did not rest his defense alone on plaintiff's failure of proofs. He testified as a witness in his own behalf, and his direct testimony, which is not controverted or disputed, demonstrated to a certainty that leaves no reasonable ground for contention, not only that he was without knowledge that the reports were false in any particular, but that every personal act of his own in connection with any report was done in entire good faith, and upon information and representations of their truth and verity that would have been accredited by any person of prudence in a like situation. His testimony is printed in full at pages 220 to 249, bill of exceptions.

Mr. Thompson testified (printed Record, p. 220) that he became connected with the bank when it assumed the name "Capital National Bank," and had no connection with the antecedent organizations of "Marsh Brothers & Mosher" and

"Marsh National Bank." He bought and paid for his stock in full at a premium of 9 per cent., and served as a director without pay, and never at any time held any other office. Asked, at page 221 (printed Record), to what persons the management of the bank was confided or delegated by the directors, witness answered: "To the president and cashier, Mosher and Outcalt, and to the executive committee that was elected for the purpose of supervising the management of the bank, and that committee was made up of W. W. Holmes and Prof. A. P. S. Stuart." His testimony touching the standing of these men is as follows:

"Q. Are you acquainted with what was the standing of C. W. Mosher at that time as a banker and business man in that community? A. Yes, sir; I am.

"Q. Now what was it? A. First class.

"Q. Did you personally regard him as a capable banker? A. I did. Everybody did.

"Q. And as a man of integrity? A. I did and everybody did.

"Q. Do you know what at that time was the standing of R. C. Outcalt in that community? A. He was the same as Mosher, except he wasn't looked upon as being as wealthy as Mosher was.

"Q. What was his reputation for probity? A. It was first class.

"Q. Was he regarded by yourself as a competent, trustworthy banker? ——.

"Q. State how you regarded him at that time as a banker? A. I regarded him very highly as a banker, and considered him and Mosher a very strong team.

"Q. Were you acquainted at that time with W. W. Holmes and A. P. S. Stuart? A. I had known W. W. Holmes 12 years at that time. I had known Professor Stuart a lesser time, I couldn't say for how long, but for several years.

"Q. Do you know what W. W. Holmes' business had been prior to that time? A. Money-loaner.

"Q. Do you know what Prof. Stuart's business was? A. He was a property-owner and money-loaner at that time.

"Q. What was the character and reputation of Mr. Holmes as a business man? A. Both Holmes and Stuart was con-

sidered the very best in Lincoln; their judgment was considered always good; they were both wealthy men, and had made their money by managing money."

Again, at page 223 (printed Record), witness said:

"I never was more astonished over a business matter of any kind, in all my life as a man, than I was over the failure of that bank. * * * I never had occasion to question the integrity of either of those men (Mosher and Outcalt), the business integrity, up until the failure of the bank. I had had some little trouble, personal trouble, with Mosher, but I had never had any business trouble or reason to question him."

At page 222 (printed Record) Mr. Thompson testified that during large parts of the years 1885, 1888, and 1890 he was, by reason of ill health, in Europe, with the knowledge of the other directors. At pages 223 and 224 he testified that from 1884 to 1890 he was superintendent of the Burlington railroad, having eleven hundred miles of track under his charge, and owned and operated a string of nine hotels. In 1890, in addition to the hotels which he still owned at date of trial, he took charge of the Lincoln Gas Company and the Lincoln Electric Company and of the Farmers' and Merchants' Insurance Company. He had been vice-president of the latter company since 1885, but took active charge of it in 1890. All of the other directors knew that he was in charge of these enterprises. He also organized and became president of the Aurora State Bank, and prior to and at the time of the failure of the Capital National was vice-president of the American Exchange Bank of Lincoln. These enterprises of which he had active control made him "a very busy man" and of necessity kept him away from home much of his time. When, in 1890, he resigned the care of eleven hundred miles of the Burlington railroad, most of which he had built, the new enterprises which he took charge of "occupied all of his time," but did not take him so much from home.

Under the conditions just detailed Mr. Thompson testified,

touching his participation in the affairs of the Capital National Bank, his knowledge thereof, and means of acquiring it (pp. 222–223), as follows:

"Q. Now, so far as the duties of administration devolved upon you as a director, state how and in what manner you discharged them. A. Well, first I want to state, I want to say, that I am not a book-keeper. I never had an education except about five years as a child, never went to school except about five years as a child. That would make it impossible for me to know anything of the books of the bank. I think I never was in Lincoln at a directors' meeting or on the day of a directors' meeting that I did not attend it. There never was a time, from the time I went into that bank until it closed, that I did not take every opportunity, after an examination by the bank examiner, to ask him of the condition of the bank. Hayden was the bank examiner soon after the organization of the bank and I knew him well; after Hayden came Griffith and I knew him well. They were both friends of mine, and after each examination, when I saw those men, I always asked how they found things in the bank. Their answers were always to the effect that the bank was all right. There never was any criticism by either of those men to me of the condition of the bank.

"Q. Now, Mr. Thompson, at the directors' meetings, what, if any, steps were taken by you to inform yourselves by statements of the officers or otherwise, as to what was the condition of the bank, and what had been its earnings? A. At every directors' meeting that I attended, as I said before, I think I never missed one when I was at home, the executive committee, or the committee whose duty it was to look after the affairs of the bank, were asked how they found things. They were asked for their statements that they always made on a slip of paper, that was lying there on the directors' table. The officers of the bank prepared their statement of the gross and net earnings of the bank, and it was there that I got all my information of the condition of the bank, from those two sources."

At pages 224 to 228 of the printed evidence Mr. Thompson is shown to have testified unequivocally and directly to the following facts: He had no knowledge that Mosher, under

the name of Western Manufacturing Company, was obtaining funds from the bank or putting paper through the bank for rediscounts or otherwise. He never knew till a receiver had been appointed that the bank was carrying any personal paper of Mosher or Outcalt. He had no knowledge at any time that the deposit account of Mosher and Outcalt was overdrawn. He had no knowledge prior to the suspension that the bank had incurred any considerable losses nor that it was in any financial difficulty. He had deposit accounts with the bank, which he controlled absolutely, at the time the bank failed, including that of the Farmers' and Merchants' Insurance Company, kept in the name of "C. W. Mosher, treas." While this account was kept officially in Mosher's name, Mosher, in actual practice, never drew a check against it and never had authority to do so. Mr. Thompson never made a single entry on any book of the bank and never directed any officer or servant to do so. He never issued nor directed issuance of any certificates of deposit and "never did anything for the bank, except to meet with them as a director and consider things that were brought to our attention, and to help elect the executive committee and officers." He had no knowledge of the certificate of deposit issued in 1891 on account of Nebraska relief fund. He had no knowledge that any false entries of debits or credits were entered in any account on the books of the bank by any of its officers or servants. He had no knowledge of any variance between the amount of any certificate of deposit issued and the corresponding entry on the books. Here we quote literally from pages 227 and 228:

"I never had any knowledge that anything was wrong there until after the bank closed, and my first information came from Griffith (the examiner who, for the Comptroller, took the bank in charge). I met him on the train almost immediately after the failure of the bank, on the train between Lincoln and Ashland. * * *

"Q. This information came to you subsequent to the failure of the bank? A. Yes, sir.

"Q. Did you know about any irregularities or false entries of any character whatever prior to the suspension of the bank? A. None at all."

Acting on the assumption that the plaintiff's petition was not sufficient to raise an issue as to the correctness of any official reports other than the two specifically set forth as exhibits, one made December 15, 1892, and one October 11, 1886, and relying on the rule of pleading that the particular representation must be fully set forth, and that failure in that behalf is a defect in substantive averment that would preclude any recovery upon allegations "that other reports in form similar" were made, counsel confined his examination, touching actual participation, to the only report fully set forth which was within the period of limitations. This report (December 15, 1892; printed Record, pp. 15-16) did not bear Mr. Thompson's attestation. While the fact that Mr. Thompson may have, as the State Supreme Court suggests, attested four of the bank's reports during his long term of service as director is not material upon the issue of *scienter*, it is still shown that, so far as the examination of the witness extended, he did not participate in any manner in the reports not attested by him (printed Record, p. 228); and he never at any time signed any publication notice to be printed in a newspaper (printed Record, p. 228), and the directors were not by the act of Congress required to separately attest the publication notice.

The cross-examination exhibited Mr. Thompson's official conduct more circumstantially and in greater detail. We here quote from pages 229 to 231, the cross-examination, conducted by Mr. Thomas:

"Q. Do you say that you did not sign a report of the condition of the Capital National Bank to the Comptroller under date of December 28th, 1886? A. I think I did not, and I will tell you why.

"Q. You may state. A. Well that is rather a long story but this is it. In 1885 I went to Europe a very sick man, so sick that nobody thought I would come back alive. I got

back in the early winter of 1885 and during the next year this road here was under construction from here up to the Northwest. I had charge of the construction. In the early winter of 1886 which was as I can best remember along about January or December we were blockaded with snow up in there and I was away for a long period of time and that came very near doing me up again. It came very near costing me my life, but at the same time I was up there attending to my business. Now I expected to be able to produce the records of the railroad company to show whether or not I was in Lincoln, but all of their records have been destroyed up to 1894 in regular conformity to their rule to destroy everything that gets so old. So all I have is my recollection and my recollection is based upon the conditions as I remember them of the winter of 1886 and 1887 during those months. I know that winter came very near finishing me, I didn't expect, myself, to get out alive.

"Q. But you remember of having signed other reports? A. I signed them whenever I attended a meeting. I always signed them if they were brought to me. I say when I attended a meeting. The directors at a meeting didn't always sign, because the requirements of the Government didn't require all of the directors to sign, but whenever I was there and it was presented to me, I always signed them.

"Q. But you didn't examine the assets of the bank to ascertain if the report correctly stated them? A. I was always willing to sign any statement of the condition of the bank from the representations that were made to me by the executive committee and the officers of the bank. I couldn't if I had wanted to have done so, made an examination into the condition of that bank and told anything about it, because I know absolutely nothing about book-keeping, and I did there precisely what I have always done with the different kinds of business I have been associated with and at the head of. Now I have been at the head of some very large institutions in this State and what I did there, I have always done.

"Q. In your bank at Aurora you never examined its notes? A. I never examined a note as long as I have been president of that bank, we have an executive committee as they did in this bank.

"Q. You have never looked at the assets yourself? A. I never have, the only thing we look at there, is when we have our annual or semi-annual meetings the notes that are con-

sidered questionable are brought on the table by the committee and discussed and at that time we settle what shall be done with them.

"Q. And if the men who were managing that bank were so disposed they could put in fraudulent paper and you wouldn't know it? A. Yes, sir.

"Q. And they could issue certificates of deposit for one amount and have the books show another one and you wouldn't know it? A. How could any man tell that?

"Q. And they could issue certificates of deposit for one amount and have the books show another amount and you wouldn't know it? A. Yes, and for all any man in the bank might know.

"Q. And so far as you know the bank at Aurora of which you are president may be at this time wholly insolvent? A. It may be if the men there are thieves like Mosher and Outcalt, it may be in the same condition.

"Q. And do you sign statements of that bank? A. I have signed them just as reported to me by these five men.

"Q. Then you sign these reports and take these men's words for it, and send them out to the world as correct? A. Yes, and you do too.

"Q. You sign your name irrespective of the facts you don't know what the true conditions are? A. How could I know better? * * *

"Q. I simply want you to state this that you are signing statements of the condition of that bank and are taking some one else's word entirely for the truth or falsity of the report? A. That is what I am doing, and I couldn't do different if I tried.

"Q. And that is what you did with the Capital National Bank? A. Yes, sir.

"Q. And you didn't know at that time whether the report was true or false? A. I couldn't have known.

"Q. You didn't make any effort to find out except by asking some one else? A. I am going to answer that question right or not at all now.

"Q. I have a right to an answer to that by yes or no. You didn't make any effort to find out except by asking some one else. Can you answer that question yes or no? A. That question cannot be answered by yes or no, because I did not ask some one else, they made their regular written statements

of the condition of that bank, and it was from that that I knew the condition of it. * * *

"Q. You never looked at the canceled certificates of deposit? A. No, I never did, and how could I tell if a certificate showed $641.00 and the records showed $1,641.00?

"Q. Do you suppose that a certificate of deposit actually issued, that the certificate had been issued for $100,000 and the records showed $5.00? A. How could I tell?

"Q. Suppose that certificate has been paid and is in the bank, do you suppose you could compare them and see if they agreed in the amount and name? A. Yes, but I will venture to saay that a man that would do such a thing as that would not be apt to leave it where I could find it."

Mr. Thompson's faith in the bank and in its executive officers, to the time of its suspension, is further emphasized by the following testimony elicited on cross-examination at pages 242 to 243 (printed Record):

"Q. You say you were in Indiana when the Capital National Bank failed? A. I was in Terre Haute. Stúll and I were over there trying to buy the Terre Haute Gas Company, I know I got a telegram there.

"Q. And you say you were astonished that the bank had failed? A. Considerably so, yes, sir.

"Q. Never had any intimation or suspicion of it? A. No, I did not.

"Q. Always thought the bank was solvent? A. I had $28,000.00 in there that I would have gotten out in some way if I had thought it wasn't.

"Q. You thought the bank was solvent? A. Yes, sir.

"Q. You thought it was doing a flourishing business? A. I had no reason for thinking it was doing a losing business.

"Q. Why did you sell your stock? A. On account of personal trouble with Mosher.

"Q. But you never questioned Mosher or Outcalt's honor? A. No, sir.

"Q. Their notes would have been good for quite a considerable amount? A. When the bank closed, the bankers told me, after I got back to Lincoln, that they wanted to let them have money to keep the bank open and Mosher wouldn't do it.

"Q. I suppose their notes for $150,000.00 either of them, would have been considered good? A. I would think so.

"Q. Without security? A. I would think so.

"Q. You sold some of your stock to Mr. Mosher, didn't you? A. Sold it to Mosher in 1891; some of it to Mosher and Outcalt together.

"Q. Did you take any security for it at that time? A. I did, but I offered to let them have it without security and Mosher says, No, I will give you security, and he said, I would rather give you security for it.

"Q. What did they give you as security? A. Gas company stock.

"Q. Notwithstanding they were reported to be millionaires you were willing to take security? A. I would take that from even you.

"Q. You say Mr. Mosher insisted upon giving security? A. I didn't put it that way. I will tell you the transaction if you want to know it.

"Q. Did he volunteer to give you the security? A. He did. I offered to take his and Outcalt's note without any security for my stock for $22,500.00.

"Q. Didn't that excite your suspicion, that he wanted to give security, when a man that is worth a million wanted to give security for that amount? A. I wouldn't think so. I am not a millionaire, but I never borrowed a dollar without giving security, I want them to take it because I want them to take something that is good.

"Q. And that didn't excite your suspicion? A. Not at all."

Further questions on cross-examination touching the incident occasioning the transfer of stock by witness to Mosher and Outcalt elicited the following testimony (printed Record, p. 248):

"Q. You say you had a personal difficulty with Mr. Mosher? A. Yes, sir.

"Q. About when? A. That was the day I sold him my stock, the very day that I sold it to him.

"Q. And your relations were never amicable after that? A. Well, we spoke as we passed each other.

"Q. You spoke as you passed by, and that was about all? A. Yes, sir, that was about all."

The redirect examination which immediately succeeded was:

"Q. Did you have any stock left after that transaction? A. I had $1,000.00.

"Q. Did you have that on the failure of the *failure* (bank)? A. Yes, sir, I did.

"Q. Did you pay the assessment on it? A. Yes, sir, I did.

"Q. How much? A. $1,000.00."

It was thus shown that Mr. Thompson, who was absent on an important business mission when the bank suspended, then had on deposit $28,000; that the failure subjected him to an assessment of $1,000 on his stock, and that he held the note of the president and cashier for $22,500 on account of the stock transaction had more than one year and two months prior to the suspension.

If the degree of faith and confidence reposed in the stability of the bank and the probity of its executive officers be measured by the extent of the personal misfortunes or the amount of funds on deposit, then Mr. Thompson was more confiding than any of the other depositors who claim relief against him. If his good faith as director and his discharge of administrative duties, in so far as they devolved upon him, be tested by the methods employed by him in the conduct of his private affairs, he is then shown to have applied the same methods to the affairs of the bank that proved successful and efficient when employed in his individual enterprises. If he should, before attesting an official bank report, require such information of its verity as would be credited by him in ascertaining the financial condition of a concern under his personal management, his conduct also meets this requirement. His conduct was not that of mere heedlessness. He required and received information as to the condition of the bank before attesting reports, and the information obtained, when judged by the same rules that governed his private business, led him to believe, in good faith, that the attested reports spoke the truth. His informa-

tion came from officers and servants not only fully trusted by him, but standing high in the community, whom he had a right to credit, and whom any business man of ordinary prudence would have credited in a like situation.

These proofs explain the statement in the State Supreme Court's opinion: "We do not wish to be understood to say that *all* of the defendants knew that such statements were false; we are satisfied that such is not the case." Mr. Thompson is necessarily comprehended by this clause, though the court denied him the justice to so state. Do these facts meet the requirements of a cause of action for *deceit?* Has the act of Congress in question adopted this remedy and made it apply to directors who have diligently and faithfully discharged such duties of administration as devolved upon them, who can assert and prove conscious rectitude *to the satisfaction of the court pronouncing judgment,* and who have not in fact been guilty of fraud or deception?

The rectitude of Mr. Thompson's personal and official conduct, so far as it is challenged by plaintiff's petition, is securely established by the references already given. But the high standard of his conduct is strengthened by his recital of the part he had in isolated transactions, about which counsel questioned him for the purpose of testing his good faith and credibility. He was asked on direct examination as to his knowledge of transactions between the bank and E. W. Mosher, of York, Nebraska. In answer he explained that it was a scheme for lending money in behalf of the bank. He showed what part he had in its authorization, the motive in permitting it, and the securities taken in a manner that leaves no room for doubt as to his good faith and his belief in the merit of the securities (printed Record, pp. 225-226).

Asked about the "Small" transaction mentioned by some of plaintiff's witnesses, he promptly gave such details as had come before the board; explained that a correspondent State banker had secured them by a conveyance, which was adjudged to be a mortgage; that the security was adequate and

the bank suffered no more than a nominal loss (printed Record, pp. 226-227).

On cross-examination he was asked as to his knowledge of transactions between Donnell, Lawson & Simpson and the bank which the Capital National succeeded, and he answered, giving the precise details of the proceedings had in relation thereto at the first meeting of the directors of the Capital National Bank; showed that the account was not to be taken over by the new organization, but was to be made good by the stockholders of the old Marsh Bank, and named specific securities delivered by the debtors to the old stockholders, and stated that his information was that the agreement made was carried into effect and the debit balance paid (printed Record, pp. 238-240).

On cross-examination he was asked about a chattel mortgage given to him just prior to the suspension of the bank by Mosher, and answered (printed Record, p. 243) as follows:

"A. Now, I will tell you about that. That was while I was in Terre Haute, Indiana; and while I was there it became evident that the bank was going to fail, and they took this chattel mortgage over and gave it to Mr. Mullen, my secretary, and I never knew anything about it until I came back, when Mr. Mullen gave me those papers; and I said to him, 'You take those papers back to them, and tell them I am not in the chattel-mortgage business.'"

He was asked about the details connected with his sale of bank stock to Mosher and Outcalt, some fourteen months prior to the bank's failure, and the securities received by him on the purchase-money note, and he gave them all without hesitation and with childlike simplicity and directness (printed Record, pp. 244-247); he made bold to assert that subsequent events indicated, what he was then innocent of, that Mosher, in substituting real estate to free negotiable securities, was evidently preparing for trouble. The following answer on page 244 fairly states the result of all this inquiry:

"A. Yes sir, I will have to tell you about that too, whether you want to hear it or not. Now, I held, up until a couple of months or such matter before the failure of this bank, this gas stock as collateral to my note. Mosher came over to my office one day and he says: 'Would you just as soon have real-estate security as collateral, instead of gas stock?' And I said, 'All right.' Mosher then gave me a lot of real-estate security. When I sold that stock to Mosher, I wanted him to understand, and I felt it, that he was welcome to that stock under the circumstances without collateral; but he said, 'I would just as soon give you collateral,' and I took it. When this real estate was given to me, it was given in exchange for that gas stock. *I had no idea that he was preparing for trouble;* but that is just what he was doing, what he wanted to do was to get something in his possession that he could handle."

We have now presented the full course and scope of Mr. Thompson's examination without consciously omitting a material fact or circumstance. If it does not remove every aspersion and insinuation against his good faith and the integrity and candor of his official acts, questioned by the plaintiff's complaint, then direct and simple recitals of truth must have lost their power to persuade. The truth of the facts recited is uncontroverted and incontrovertible. We shall endeavor to show that upon these facts a judgment against him for *deceit,* at the suit of a depositor, cannot be sustained under the terms of the National Banking Act.

Section 5239 (Rev. Stat. U. S.) provides:

"If the directors of any national banking association shall *knowingly violate,* or *knowingly permit* any of the officers, agents or servants of the association to violate *any of the provisions of this title,* all the rights, privileges, and franchises of the association shall be thereby forfeited. *Such violation* shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of *such violation,* every director who participated in or assented to the same,

shall be held liable in his personal and individual capacity for all damage which the association, its shareholders, or *any other person,* shall have sustained in consequence of *such violation.*"

It is to be noted the above section, in stating the contingencies which subject directors to personal liability, follows, almost literally, the language of section 5147, defining the oath which *each* director is required to take. The section prescribing the form of oath (sec. 5147, Rev. Stat. U. S.) provides:

"*Each* director, when appointed or elected, shall take an oath that he will, *so far as such duty devolves on him,* diligently and honestly administer the affairs of such association, and will not *knowingly violate,* or *willingly permit* to be violated, *any of the provisions of this title.*"

The conditions on which liability of forfeiture of charter and personal liability of directors are made to depend are the violations of obligations assumed by each director by his oath of office. By the explicit terms of section 5239, above quoted, such consequences are to follow *only the clear violation, by the individual director,* of his official oath. The only variance found in the latter section from the exact standard of conduct prescribed by the form of oath is the substitution of "*knowingly permit,*" in the latter section, for "*willingly permit,*" the term employed in the oath, and this variance is merely verbal and does not affect the sense or meaning.

Two views have been judicially expressed as to the proper meaning and interpretation of section 5239. One view is that the judgment of forfeiture required at the suit of the Comptroller as a condition precedent to dissolution is also a condition precedent to maintenance of an action to enforce the personal liability of directors (*Welles v. Graves,* 41 Fed., 459; *Gerner v. Thompson,* 74 Fed., 125). The other

view was well expressed by Thayer, C. J., in *Stephens v. Overstolz,* 43 Fed., 771, as follows:

"According to our view of section 5239, *two results,* in no respect dependent upon each other, may follow the making of an excessive loan; that is to say, the Comptroller may, if he thinks proper, proceed to have the charter revoked, alleging the excessive loan as a violation of law. But whether he does so or not, a director of the bank, who *knowingly* participates in or assents to the loan, may be compelled to make good whatever damage results to the bank from making the same."

This view seems to be at the foundation of the ruling in *Briggs v. Spaulding,* 141 U. S., 132-173; and, since it is the view operating most strongly against us, we concede its correctness for the purposes of this argument.

Here the vital consideration is that, whatever view be adopted, the personal liability of the directors is *derived* from the terms of the act of Congress. If the common-law remedies are available against directors in favor of "any other person" who may have sustained damages, it is because of their adoption by Congress in this section of the statute; and, having been so adopted by statute, these remedies are subject to the express limitations and restrictions placed upon them by the literal and precise terms of the act of adoption defining the precedent conditions of their availability. One of these conditions is that the director charged must either have personally *"knowingly violated"* or *"knowingly permitted"* (or by the terms of his oath *willingly* permitted) the *officers or servants* to violate some provision of the National Banking Act. The fact of *knowledge* and *willful purpose,* which is *scienter,* is thus, by apt terms, made a necessary and indispensable element.

To make sure our argument is based upon an indisputable premise, let us further examine the terms of section 5239: It consists of three sentences, all employing apt and specific terms. The *first* sentence contains a definite specification of

the distinct acts violative of *this title* which shall work a forfeiture. The *second* sentence as distinctly employs the identical specifications of the *first,* by reference, as if they were again repeated literally; it is introduced by the adjective *such,* modifying the noun *violation;* and the sole office of the words *such violation,* in this connection, is to definitely specify the identical conditions employed in the preceding sentence, and to import them into the *second,* and make them the subject of the judicial inquiry therein authorized. (See adjective *such* defined in any English dictionary of accredited accuracy.) The *third* and concluding sentence, imposing pecuniary liability, is introduced by the conjunction *and,* followed by a repetition of the words *such violation,* employed above, to introduce the *second* sentence. In the *third* sentence the introductory words *such violation* are, therefore, employed correlatively with the same terms in the *second,* and perform the same office of definitely specifying the *violations* resulting in personal liability to be those previously defined in the *first* sentence. Such references, back to the first-stated conditions, are obvious, evident, and unavoidable.

Proceeding with the argument: The last sentence, therefore, imposes personal liability only in those cases where the director has *knowingly* violated or *knowingly* or *willingly* permitted some other officer or servant to violate some provision of *this title.* The mere fact of *such violation* by some of the directors or officers is not, alone, sufficient to establish liability against all or any particular director; for, by the terms employed to create such personal liability, it is limited and made to apply *only* to the particular director or directors who actively or knowingly or willingly 'participate in or assent to the same.' The element of *scienter* is thus definitely written in the statute. No master of English could have made this meaning plainer or more evident. This conclusion and interpretation is irresistible; it condemns, and ought to destroy, the judgment of the State court.

McDonald v. Williams, 174 U. S., 397-408, a suit arising out of the administration of the assets of this same *Capital National Bank*, is a precedent directly in point which definitely sustains the construction contended for. The case involved the construction and interpretation of section 5204 (Rev. Stat. U. S.), prohibiting withdrawal by a banking association or its members, "either in the form of dividends or otherwise, any portion of its capital." The word *knowingly* is not actually employed in the section. This court by construction read into that section the element of *knowledge*, which is literally employed in section 5239. Mr. Justice PECKHAM in the opinion (p. 406) said:

"One is not usually said to permit an act which he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge. Ought it to be said that he withdraws or permits the withdrawal by ignorantly, yet in entire good faith, receiving his proportionate part of the dividend."

The meaning above read into the section under consideration by *construction* is expressed in section 5239 *literally*, without aid of construction.

It is further to be observed that the act of Congress in denouncing as crimes falsifications contained in the official reports which the association makes to the Comptroller imposes the penalties, not upon the officers or directors who actually make or attest the reports, but only upon the person making or responsible for making the particular false entry therein (sec. 5209, Rev. Stat. U. S).

In *Cochran v. U. S.*, 157 U. S., 286, 293, Mr. Justice WHITE, construing section 5209 (Rev. Stat. U. S.), said:

"The argument of the defendant assumes that the making of the entry, and the making of the report, are the same thing; whereas, in fact, they are wholly different. By section 5211, the report must be made by the *association*, and must be verified by oath or affirmation of the president or cashier, and attested by the signature of at least three of

the directors. But, under section 5209, there is no penalty affixed to the association or its officers for making a false report, nor to the president or cashier for verifying such report. The penalty imposed by section 5209 is affixed to the one who *makes any false entry* in any book, report or statement of the association; and that penalty is applicable to any officer or agent of the bank who actually makes the entry," etc.

The purpose and intent of the act is to limit the criminal and civil liabilities depending upon violations of its provisions so that they shall apply only to the actual wrong-doers. In the conduct of corporate business, whether it be financial, commercial, or industrial, all experience teaches that efficient and successful results can generally be attained only by wise selection of trustworthy officials and servants, and then reposing in them a fair degree of faith and trust. Corporate success is not possible under a management that scrutinizes every act and detail of every corporate servant and agent, upon the theory that every such agent or servant is a crook, and that every act will be criminal not done under such immediate supervision as would at once discover its character. The presumption that normal persons, wisely chosen for the trusts committed to them, will ordinarily act from honest and not from criminal motives is essential to business success. And Congress, on providing the national banking system, did not enact that each director should, on pain of being held personally liable for all deposits, conduct the bank's affairs on the theory and presumption that the executive officers, carefully selected, were crooks who in the discharge of all ordinary duties would commit crimes. On the contrary, extraordinary liabilities are imposed only for willful volations and only upon the actual wrong-doer. The whole scheme embodied in the act is made to harmonize with the usual and ordinary standards which experience shows are conducive to best results in financial, commercial, and industrial enterprises.

Congress did not enact that the *innocent* director be sacrificed as a vicarious atonement for the crimes, secretly committed, of a faithless executive officer who had been chosen in good faith. Neither did it enact that the association should, like the Garden of Hesperides, have a dragon sentinel put on watch over its affairs, whose ferocious vengeance would visit undiscriminating disaster alike upon the innocent and the guilty. Such consequences will, however, necessarily flow from the rule adopted by the Nebraska Supreme Court, eliminating *scienter* and striking from section 5239, wherever employed, the word *knowingly*.

It cannot be urged, in defense of the judgment of the State court, that it tends to stimulate or promote honesty in business transactions. On the face of the record, the judgment makes no pretense of imposing liability against Mr. Thompson because of his dishonesty; on the contrary, as heretofore shown, his honesty and good intentions are judicially established; he is held not even to have known of the falsehoods on which the suit is based. The judgment of the State court makes no pretense of imposing liability upon Mr. Thompson because of his maladministration or neglect of official duty; on the contrary, losses from such causes accrue to the association and pass to the receiver for equal and ratable distribution to *all* depositors. The present plaintiff seeks the entire avails of this suit. To justify its ruling the State court was driven to a distinct disavowal that either negligence or maladministration was a ground of liability in the present suit, and so distinctly classified the suit as an action of deceit. On any other construction the State court concedes that plaintiff could not sue for its own benefit, to the exclusion of other depositors.

At the common law and by the act of Congress *scienter* is an element of the cause of action of *deceit*. This cause can properly be maintained only upon sufficient proof of actual fraud and dishonesty. But the State court conceded Mr. Thompson's honesty, and, like a dragon, visited its

wrath upon him along with the guilty and dishonest officials. What a lowering of judicial standards! When the judicial rewards of honesty are but the punishments prescribed for the guilty, what stimulus can the courts claim to offer for the promotion of official integrity? Its employment to enable one sufferer from a common misfortune to turn upon a fellow-loser and seize what he still has left puts the action of *deceit* to a new and startling use and purpose, never dreamed of by the ministers of the common law, who gave relief only against the *wrong-doer*. Contemplation of such judicial rewards of honesty recalls the words of Antigonus to Leontes:

> "If it be so,
> We need no grave to bury honesty;
> There's not a grain of it the face to sweeten
> Of the whole dungy earth."

Long before the passage of the National Banking Act, and at least as early as 1851, this court had definitely ruled that, at common law, *scienter*—guilty knowledge and willful participation in the fraud—is an essential and indispensable element of the cause of action for deceit (*Lord v. Goddard*, 13 How., 211), which applied the rule requiring proof of *scienter* as rigidly, perhaps, as any of the reported cases. There a written letter recommending a firm as entitled to credit was the basis of the action. The fact that the firm so recommended was not entitled to credit is thus asserted in the opinion:

"On the faith of this letter, Goddard credited West & Daby for a cargo of lumber worth nearly two thousand dollars, giving them four months' time; for which lumber West & Daby never paid, having been insolvent when the letter of recommendation was given, and so continued afterwards. It is clear that they were mere insolvent adventurers, without property, and entitled to no credit or confidence."

Under these aggravating circumstances, Mr. Justice CATRON, expressing the unanimous opinion of this court, said.

"The gist of the action is fraud in the defendants, and damage to the plaintiff. Fraud means an *intention* to deceive. If there was no such intention; if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue. Since the decision in *Haycroft v. Creasy,* 2 East, made in 1801, the question has been settled to this effect in England.

"The Supreme Court of New York held likewise in *Young v. Covell,* 8 Johns., 23. That court declared it to be well settled that this action could not be sustained, without proving actual fraud in the defendant, or an *intention* to deceive the plaintiff by false representations. The simple fact of making representations, which turn out not to be true, unconnected with a fraudulent design, is not sufficient. This decision was made forty years ago, and stands uncontradicted, so far as we know, in the American courts."

The rule of the above-cited case, holding that it has for more than a century been the settled doctrine of the common law that *scienter* is a necessary element of the cause of action for deceit, has not been departed from by this court. On the contrary, that doctrine has since been adhered to and repeatedly reaffirmed, as the following cases show:

In *Ming v. Woolfolk,* 116 U. S., 599, 602, Mr. Justice WOODS, in an opinion expressing the unanimous judgment of this court, thus defined the elements of the action of *deceit:*

" 'The requisites to sustain an action for deceit,' says Baron Parke in *Watson v. Poulson,* 15 Jurist, 1111, are 'the telling of an untruth, *knowing* it to be an untruth, with *intent* to induce a man to alter his condition, and his altering his condition in consequence, whereby he sustains damage.' See also *Palsey v. Freeman,* 3 T. R., 51; *Polhill v. Walter,* 3 B. & Ad., 114; *Levy v. Langridge,* 4 M. & W., 337; *Brown v. Castles,* 11 Cush., 348; *Tryon v. Whitmarsh,* 1 Met. (Mass.), 1."

In *Gordon v. Butler,* 105 U. S., 553, 556, the action for deceit and fraud was founded on a written estimation or appraisal of the value of property offered as security for a loan of money. Mr. Justice FIELD, delivering the unanimous opinion of this court, said:

"The essence of the charge against them is a conspiracy to defraud the plaintiff, carried into execution by a *false* and fraudulent certificate of valuation of the property given as security for the loan. * * * To justify any imputation of fraud in giving the certificate, it was necessary to show that the parties signing it had *knowledge, at the time,* that the value of the property was materially less than their estimate."

The State courts at and prior to passage of the National Banking Act were in unanimity in their holdings that, at common law, *scienter* was a necessary element of the cause of action for deceit, and the State courts are still in practical unanimity in holding to the same rule. The courts of New York, whose judgment was cited as authority by this court in *Lord v. Goddard* (*Young v. Covell,* 8 Johns., 23), have since maintained a consistent adherence to the rule. In a recent case, *Kountze v. Kennedy,* 147 N. Y., 124, the Court of Appeals, in an opinion by ANDREWS, C. J., said:

"The principle stated by Croke, J. (3 Bulst., 95), in respect to actions for damages for deceit, that 'fraud without damage, or damage without fraud, gives no cause of action, but when these two concur an action lies,' has ever since been recognized as the true rule governing the subject. The cases are numerous. The principle has been obscured by the use by judges of the phrase 'legal fraud,' which has sometimes been interpreted as meaning fraud by construction, and as indicating that something less than actual fraud may sustain an action for deceit. The gravamen of the action is actual fraud, and nothing less will sustain it. The representation upon which it is based must be shown not only to have been false and material, but that the defendant when he made it knew that it was false, or, not knowing whether it was true or false and not caring what the fact might be,

made it recklessly, paying no heed to the injury which might ensue. Misjudgment, however gross, or want of caution, however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit. The man who *intentionally* deceives another to his injury should be legally responsible for the consequences. But if, through inattention, want of judgment, *reliance upon information which a wiser man might not credit, misconception of the facts* or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet, if the misrepresentation was honestly made, believing it to be true, whatever other liability he may incur, he cannot be made liable in an action for deceit."

Among other New York cases to the same effect are: *Powell v. Linde,* 171 N. Y., 675; *Daly v. Wise,* 132 N. Y., 306; *Lamb v. Kelsey,* 54 N. Y., 645; *Wakeman v. Dailey,* 51 N. Y., 27; *Hubbell v. Meigs,* 50 N. Y., 480; *Oberlander v. Spiess,* 45 N. Y., 175; *Marsh v. Falker,* 40 N. Y., 562.

Professor LEE, in a most excellent article on *Fraud* (20 Cyc., 24), says: "It is well settled that to support an action of deceit, based on false representations, a *scienter* must be proved." And in the foot-note he supports the text by references to numerous adjudications in twenty-six States, in the Federal courts, and in the English and Canadian courts. The Supreme Court of Nebraska is well-nigh alone in perverting the common-law doctrine by striking out the element of *scienter,* which is the very pith and substance of the charge of deceit.

We forbear to burden the brief with further references to adjudicated cases. The existence of the common-law rule contended for had been declared by this court and recognized by the courts of the several States prior to passage of the National Banking Act. The fact of its existence and general recognization at the date of passage of that act is well established. It remains only to make the application of this fact to the present case.

If Congress intended by the act in question, and particularly by section 5239, to adopt the common-law remedy of deceit as an appropriate remedy in behalf of a depositor against a director for recovery of damages sustained through official acts in attesting reports to the Comptroller which were false and untrue, it would naturally adopt the common-law rule of liability. By that rule the remedy could apply only when the attestation was made in bad faith, with knowledge on the part of the director of the falsity thereof. Congress, therefore, adopted the rule of the common law as then interpreted by it in the act itself. Insomuch as the liabilities of directors and the rights of persons injured might be enforcible in the State forums, it was desirable that the rule of liability be uniform; that the question of liability should not be the subject of the mere whim or the established rule of a merely local forum. Uniformity of the rule of liability was aimed at; and so the act defined the conditions upon which personal liability of the director should attach. Congress placed its own meaning and interpretation upon the common-law rule adopted by it, which was then the accepted interpretation of the courts. To hold any other interpretation would tend to lessen the efficiency of the national banking system as a public utility and to make the liabilities of these important public functionaries a matter of doubt and uncertainty, subject to arbitrary rules of the local forum. The feasibility of taking the responsibility of a national bank director would, under any other rule, depend upon the particular location of the bank.

II.

The specific regulations adopted by Congress to safeguard the interests of depositors and to insure faithful administration by directors are exclusive. They preclude all local State regulations and interference. Their uniform enforcement throughout the land is essential to the preservation and maintenance, as a public utility, of this national institution.

It is entirely clear that the rule of liability defined by the act of Congress is exclusive. It binds and controls the State courts, and cannot lawfully be circumvented either by a State law or by application of a supposed contrary rule of the common law. By the Constitution of the United States (art. VI, sec. 2) it is declared:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof * * * shall be the Supreme Law of the Land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

Thus, by the fundamental and paramount law, the act of Congress is expressly made a part of the law of "every State," and "the judges in every State shall be bound thereby." That the National Banking Act in itself embodies a complete system, and that its provisions are exclusive, touching the particular subjects treated, are propositions too well settled by adjudications in this court to admit of any reasonable dispute. Mere references to the cases are the conclusive and only arguments to these points now admissible.

In *Cook County National Bank v. United States*, 107 U. S., 445, 448, Mr. Justice FIELD, defining the scope and purpose of the National Banking Act, in an opinion expressing the unanimous views of the court, said:

"We consider that act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositories of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed, and other debts paid or their property applied towards such payment. Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, *as in a separate code by itself,* neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates."

Easton v. Iowa, 188 U. S., 220-239, involved the power of the State, by statute, to provide for punishment of national bank officials receiving deposits with knowledge of the bank's insolvency. In an opinion holding the State law invalid and the provisions of the National Banking Act to be paramount and exclusive Mr. Justice SHIRAS, after reviewing the adjudications, expressed the unanimous views of the court as follows (pp. 238-239):

"Our conclusions, upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; that Congress has directly dealt with the subject of insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports

to be made of their condition, and by the power of visitation by Federal officers; that it is not competent for State legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the General Government. * * * Undoubtedly a State has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction. So, likewise, it may declare, by special laws, certain acts to be criminal offenses when committed by officers or agents of its own banks and institutions. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States. It was by failing to observe the distinction between the two classes of cases that, we think, the courts below fell into error."

Davis v. Elmira Savings Bank, 161 U. S., 275-290, involved the validity of a statute of New York giving savings-bank deposits a preference in the distribution of assets of insolvent banks. In holding the State law invalid, in so far as it was sought to be applied to a subject covered by the act of Congress, Mr. Justice WHITE, in an opinion expressing the unanimous judgment of the court, said (p. 283):

"National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that any attempt by a State to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal Government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

In *Easton v. Iowa, supra,* 188 U. S., 229, the Iowa Supreme Court in its opinion noted that the acts of Congress provided no penalty for the fraudulent receiving of deposits; asserted that the State law did not, therefore, encroach upon the

subject-matter of the national legislation, and that it was not material that, in violating the State law, the offender was doing an act pertaining to his duty as an officer of a national bank. Answering these suggestions, Mr. Justice SHIRAS in the opinion said:

"We think that this view of the subject is not based on a correct conception of the Federal legislation creating and regulating national banks. That legislation has in view the erection of a system *extending throughout the country*, and *independent*, so far as powers conferred are concerned, of *State legislation*, which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States."

Another line of cases which well illustrates the rule that the National Banking Act is complete in itself, like a separate and distinct code, whose provisions touching the subjects actually legislated upon are exclusive, relates to the penalties for collecting usurious rates of interest. Most of the States have usury laws, and the State courts have frequently applied the penalties prescribed by State laws to national banking associations. Whenever such judgments have been here for review, this court has held the remedy provided by the act of Congress to be exclusive, and has reversed the judgments of the State courts applying the rule of the local forum (*Bank v. Dearing*, 91 U. S., 29; *Barnett v. National Bank*, 98 U. S., 555; *Stephens v. Monongahela Nat. Bank*, 111 U. S., 197; *Haseltine v. Central Bank*, 183 U. S., 132; *Schuyler Nat. Bank v. Gadsden*, 191 U. S., 451, repelling a very recent invasion and usurpation of power by the Nebraska Supreme Court).

Farmers' and Merchants' National Bank v. Dearing, 91 U. S., 29-37, is the original case construing the provisions of the National Banking Act, in respect to penalties for taking usurious interest, to be exclusive. In expressing the view that Congress intended by the act to establish a uniform rule applicable to all national banks, without regard to local

usury laws, Mr. Justice SWAYNE in the opinion (p. 33) said:

"The offense of usury under this section is as great where the local law does not, as where it does, define the rate of interest. The same considerations apply in both cases. Why should Congress punish in one class of cases, and, so far as its action is concerned, exempt in the other? Why such discrimination? The result would be, that in Pennsylvania, where the contract would be void only as to the unlawful excess, the bank would lose nothing but such excess; while in New York, under a contract precisely the same, except as to the identity of the lender, the entire debt would be lost to the bank. This would be contrary to the plainest principles of reason and justice."

The argument embodied in the above quotation is peculiarly applicable to the present case. The official acts of Mr. Thompson complained of here, if done in New York, would not subject him to liability in an action of deceit, because the rule in that State requires proof of *scienter*. But in Nebraska, if the local law governs, on the same facts, and notwithstanding a specific finding of his good faith, Mr. Thompson is, in effect, made liable for all the deposits, amounting to more than one million dollars. Applying the argument of Justice SWAYNE: "Why such discrimination? This would be contrary to the plainest principles of justice."

In the same case (*Bank v. Dearing*, 91 U. S., 33) it was further said in the opinion by Mr. Justice SWAYNE:

"The national banks organized under the act are instruments designed to be used to aid the Government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.'

Against the national will, 'the States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.' *Bank of the United States v. McCulloch, supra* (4 Wheat., 316); *Weston and Others v. Charleston*, 2 Pet., 466; *Brown v. Maryland*, 12 Wheat., 419; *Dobbins v. Erie County, id.*, 419. The power to create carries with it the power to preserve. The latter is a corollary from the former. The principle announced in the authorities cited is indispensable to the efficiency, the independence, and indeed to the beneficial existence, of the General Government; otherwise it would be liable, in the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every State in the Union. Infinite confusion would follow. The Government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed. * * *

"It must always be borne in mind that the Constitution of the United States, 'and the laws which shall be made in pursuance thereof,' are 'the supreme law of the land' (Const., art. 6), and that this law is as much a part of the law of each State, and as binding upon its authorities and people, as its own local constitution and laws. In any view that can be taken of the thirtieth section, the power to supplement it by State legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion. There was reason why the rate of interest should be governed by the law of the State where the bank is situated; but there is none why usury should be visited with the forfeiture of the entire debt in one State, and with no penal consequence whatever in another. This, we think, would be unreasonable, and contrary to the manifest intent of Congress."

The point here urged against the validity of the judgment under review is not new. Neither counsel nor this court, as constituted since passage of the National Banking Act, has had the initiative in its presentation or application. It involves the conception of a nationality that is supreme within its sphere of action, the exercise of whose powers, within the limitations imposed by the instrument which granted them,

operates as a restraint upon the States. It involves the relations of the National Government with the States, the limitations of the powers of each, and the separate boundaries within which each may consistently exercise supreme and sovereign power. It involves a question formerly so sensitive and vital to the national life that its adjudication by Chief Justice MARSHALL, the world's greatest jurist, aided by luminous arguments by such master advocates as Webster, Pinckney, and Clay, could not stay a challenge to arms by the States still holding to the doctrine of State supremacy. Without any disparagement of the eminent jurists who, in the cases already cited, have applied the rule of national supremacy in interpreting the act of Congress which creates our present national banking system, it may be said that the first promulgation of that rule, and its judicial credence and application, should be accredited to Chief Justice MARSHALL. It arose in a series of cases involving the power of the States to tax the branches of the Bank of the United States established within the States. Unfettered power of taxation by the States involved the power to make the burden so onerous as to drive the national institution out of the States,—and some of the States manifested a spirit tending to that end and to supplanting it by State banks. The conception of a nationality with supreme authority when acting within its delegated powers, and whose exercise of authority within such powers was so far a restraint upon State sovereignty, led Chief Justice MARSHALL to the conclusion that the regulations prescribed by Congress for government of the Bank of the United States were exclusive and precluded local interference by the States, even in the matter of taxation, in the absence of any explicit prohibition in the act itself (*McCulloch v. State of Maryland*, 4 Wheat., 316-437; *Osborn v. Bank of United States*, 9 Wheat., 738-903; *Bank of United States v. Planters' Bank*, 9 Wheat., 904).

The doctrines since held by this court to control the interpretation of the present national banking law and to de-

termine the national character of the associations created by the act of Congress now in force were all declared and expounded in the opinions in the first two of the cases above cited, with a power of analysis, not only unsurpassed, but unequaled.

In *McCulloch v. Maryland*, 4 Wheat., 424, after a long and minute analysis of the public utilities and functions to be performed by the agency of the Bank of the United States, Mr. Chief Justice MARSHALL in the opinion said:

"It can scarcely be necessary to say, that the existence of State banks can have no possible influence on the question. No trace is to be found in the Constitution of an intention to create a dependence of the Government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution."

That the power of taxing the bank by the States may be exercised so as to destroy it was said in the opinion to be "too obvious to be denied." The principle operating, in such situation, to place the bank beyond the reach of the taxing power of the States was thus stated in the opinion (*Ib.*, 426):

"This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these

powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."

In determining the issue with reference to the relations of the two sovereignities, that of the Union and of the States, the Chief Justice said (pp. 429, 430):

"If we measure the power of taxation residing in a State, by the extent of sovereignity which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the Government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the Government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. We find, then, on just theory, a total failure of this original right to tax the means employed by the Government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise."

We quote further from the same opinion (*Ib.*, 431):

"Would the people of any one State trust those of another with a power to control the most insignificant operations of

their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused."

And again (p. 433):

"If the controlling power of the States be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the General Government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation."

Answering the suggestion, the rule adopted should be reciprocal and deprive the Federal Government of power of taxing State banks, the Chief Justice said (pp. 435, 436):

"But the two cases are not on the same reason. The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But, when a State taxes the operations of the Government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of

a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

Osborn v. Bank of the United States, 9 Wheat., 738-903, held invalid a statute of Ohio imposing upon the Bank of the United States, or any other bank doing business within the State without authorization by its laws, an annual tax of $50,000 on each office of discount and deposit. The questions decided in *McCulloch v. Maryland* were again maturely considered, and the holding of the former case was reaffirmed. Speaking of the situation which would be presented if the Federal courts in such cases had no power to restrain enforcement of the void act, Chief Justice MARSHALL in the opinion (pp. 847, 848) said:

"A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts, that the agents of a State, alleging the authority of a law void in itself, because repugnant to the Constitution, may arrest the execution of any law in the United States. It maintains, that if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the Government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty, may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of

arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

"These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and, if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on the bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer for the performance of his duty, than by the infliction of this penalty on a bank, which, while carrying on the fiscal operations of the Government, is also transacting its own business; but, in both cases, the officer levying the penalty acts under a void authority, and the power to restrain him is denied as positively in the one as in the other.

"The distinction between any extreme case, and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears, when considering the question of jurisdiction; for, if the courts of the United States cannot rightfully protect the agents who execute every law authorized by the Constitution, from the direct action of State agents in the collection of penalties, they cannot rightfully protect those who execute any law."

Defending the right of the bank as a fiscal agency of the Government to claim exemption from the operation of local State laws, the Chief Justice further said (pp. 863, 864):

"Were the Secretary of the Treasury to be authorized, by law, to appoint agencies throughout the Union, to perform the public functions of the bank, and to be endowed with its faculties, as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the States as the bank, and not more so. If, instead of the Secretary of the Treasury, a distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labor and expense,

the profits of the banking business, instead of other emoluments, to be drawn from the Treasury, which banking business was essential to the operations of the Government, would each State in the Union possess a right to control these operations? The question on which this right would depend must always be are these faculties so essential to the fiscal operations of the Government, as to authorize Congress to confer them? Let this be admitted, and the question, does the right to preserve them exist? must always be answered in the affirmative.

"Congress was of opinion that these faculties were necessary, to enable the bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national legislature. But, were it now to undergo revision, who would have the hardihood to say, that, without the employment of a banking capital, those services could be performed? That the exercise of these faculties greatly facilitates the fiscal operations of the Government, is too obvious for controversy; and who will venture to affirm, that the suppression of them would not materially affect those operations, and essentially impair, if not totally destroy, the utility of the machine to the Government? The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government, than it could otherwise be; and, if this be true, the capacity to carry on this trade, is a faculty indispensable to the character and objects of the institution."

Answering the suggestion that to exclude State authority it was necessary that the act of Congress contain an *express* exemption of the bank from State interference, the Chief Justice said (pp. 865, 866):

"It is not unusual, for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply without expressing, this very exemption from State control, which is said to be so objectionable in this instance. The collectors

of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples, in point. It has never been doubted, that all who are employed in them, are protected while in the line of duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them, by the judicial power alone; that is, the judicial power is the instrument employed by the Government in administering this security."

Mr. WEBSTER's famous exposition of the Constitution, delivered in the Senate in 1832 and so generally considered to be the most complete and correct exposition of the true powers and functions of the National Government, may, almost, be said to be but an adaptation of the analytical expositions of Chief Justice MARSHALL, contained in the opinions above cited. While we question whether the exposition of the greatest advocate surpasses that of the greatest judge, they, happily, arrived at the same conclusions. The following paragraph is from Mr. WEBSTER's great speech:

"And finally, the people of the United States have at no time, in no way, directly or indirectly, authorized any State legislature to construe or interpret their instrument of government, much less to interfere by their own power to arrest its course and operation. If, sir, the people in these respects had done otherwise than they have done, their Constitution could neither have been preserved nor would it have been worth preserving. And if its plain provision shall now be disregarded, and these new doctrines interpolated in it, it will become as feeble and helpless a being as enemies, whether early or more recent, could possibly desire. It will exist in every State, but as a poor dependent on State permission. It must borrow leave to be, and will be, no longer than State pleasure or State discretion sees fit to grant the indulgence, and to prolong its poor existence."

In *Van Brocklin v. Tennessee,* 117 U. S., 151, 155, Mr. Justice GRAY (adopting the language of Marshall, C. J. in *McCulloch v. Maryland*) said:

"There is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control. The States have no power, by taxation *or otherwise,* to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

All of the principles declared to be at the foundation of the decisions against the power of the States to tax the Bank of the United States apply with added force to the case made by the record now under consideration. The act incorporating the Bank of the United States seems to have been silent upon the question of whether the bank was subject to, or exempt from State taxation. But the present National Banking Act has adopted *specific regulations* for safeguarding the interests of depositors and for stimulating directors to a faithful discharge of their administrative duties, including the imposition of a definite and contingent personal liability for violations of duty, *knowingly* done. These regulations are exclusive and binding upon the courts and legislatures of all the States. The director called to account civilly for improper discharge of official duty is entitled to have the question of his liability determined upon a consideration of the act of Congress defining his duties and fixing and determining the conditions upon which such liability arises. In assuming to adjudge Mr. Thompson's liability upon considerations wholly without the terms of the act of Congress and upon facts which, by the definite terms of the act, distinctly excluded all liability the State court has made the purely local rule of its own forum superior to the rule adopted by Congress; it has made the authority of the State paramount to that of the National Government, over a national utility and administrative agency, in the creation and regulation of which the national authority is, by the Constitution, supreme; and it has thus, most completely,

nullified the act of Congress in so far as it applies to determine Mr. Thompson's liability as a national bank director. Encroachment by the State authorities upon the supreme powers of national administration and impairment by the State courts of rights and privileges granted by Congress to an agent of the national administration are not to be tolerated. The interpretation of the National Constitution, consistently maintained by this court for a century or more, leads necessarily to the conclusions that the regulations contained in the National Banking Act are paramount and exclusive, and that the courts of all the States are bound to recognize and administer them in determining the liabilities for official acts of the administrative public functionaries created by that act of Congress.

The doctrine that the laws of Congress, passed pursuant to the Constitution, to facilitate the national administration are supreme and exclusive and must be recognized, observed, and obeyed by all the States had, however, been suggested long before its ultimate determination by Chief Justice MARSHALL in the great cases of the Bank of the United States. That doctrine was at the foundation of the decision of this court in *Chisholm v. Georgia,* 2 Dallas, 419-480, decided in 1793. In that case Mr. Justice WILSON (2 Dall., 464) said:

"When certain laws of the States are declared to be subject to the revision and control of the Congress (Const., art. I, sec. 10), it cannot, surely, be contended that the legislative power of the National Government was meant to have no operation on the several States."

Before the creation of this court, of which he became a justice upon its organization, Mr. WILSON asserted that the Congress, under the Articles of Confederation, had power to institute, organize, and charter the Bank of North America. Insomuch as the greatness of that eminent statesman and jurist has, in later years, been so generally, though tardily, recognized, it is appropriate to note that in his argument

favoring the establishment of the Bank of North America, made in 1785, he is accredited with saying:

"Whenever an object occurs, to the direction of which no particular State is competent, the management of it must, of necessity, belong to the United States in Congress assembled."

It is singular how the great principles controlling the powers and functions of the General Government have, from the days of the Confederation to the present, found expression in forensic debate before and judicial decisions since the adoption of the Constitution interpreting the powers and privileges of national banks created by the various acts of Congress. Adapting the principle asserted by Mr. Justice WILSON, Congress and this court have always found the establishment and regulation of these national administrative functionaries an *object* "to the direction of which no State is competent," and that the management of them "of necessity belongs to the United States." So, necessarily, the regulations prescribed by Congress defining their powers and liabilities and the liabilities of their officers for official acts are the supreme and exclusive rules, binding alike upon the Federal and State courts. If the condition precedent to any personal liability of the director for official acts (that his conduct was knowingly or willfully violative of the banking act) may be disregarded and erased by the State courts, then section 5239 may as well be entirely erased and obliterated.

The cases already adjudged by this court involving the scheme of national banking cover a wide scope of interpretation and analysis and leave no unexplored field of inquiry. Attempted usurpations and invasions by the States upon three separate subjects of this national legislation are shown in the judgments cited. The Iowa court (and the courts of other States) ruled that national bank officers in doing official acts were subject to the criminal laws of the State. The New York court ruled that a State law giving priority

to savings bank deposits in distribution of the assets of insolvent banks was enforcible against national bank receivers. Other State courts ruled that national banks were subject to local usury laws. These instances indicate a tendency toward aggrandizement and usurpation by the local forums and an obstinate disregard of the national character and purpose of the national banking system. These attempted usurpations of local power to supplement and aid the national banking scheme devised by Congress—(1) by affording greater protection to depositors through criminal punishments for fraudulently receiving deposits, (2) by protecting borrowers from excessive interest charges through imposition of more stringent penalties for usury, and (3) by protecting the sacredness of savings bank investments through preferences in cases of insolvency—were repelled by the judgments of this court in the cases cited. This court, in *McDonald v. Williams*, 174 U. S., 397, determined the liability of a stockholder, charged with receiving dividends out of the capital, solely upon the terms of the banking act, to the exclusion of the common-law rule in such cases.

The instances mentioned are not more glaring than that exhibited by the present record. The considerations requiring this court in those cases to uphold the national character of the banking scheme providing a national bank currency apply with emphasis to the present case. In principle the cases cannot be distinguished. To sustain this view we here suggest a further application of the rule of those cases to the present record.

The plaintiff here is a depositor of the Capital National Bank, and has the same rights as other depositors to claim the protection of the official reports and the same remedies for redress. Congress legislated in plaintiff's interest. Congress adopted such measures as it deemed wise and expedient to safeguard the interests of the depositors; it provided a specific individual liability against all shareholders equal to the par value of the stock for the sole use of the bank's

creditors in case of insolvency, and furnished an agency for summary imposition and collection thereof; it provided for actions, in favor of all persons damaged thereby, against such of the directors as *knowingly violate* or *knowingly permit* violations of the act, and it provided criminal punishments against the particular officers guilty of embezzlements and other faithless acts in breach of trust, including the making of false entries in books or reports. In these respects Congress, on creating this national institution as a public utility, determined, in its own wisdom, what provisions were prudent and necessary for the best and truest interests of the depositors without delegating to the State legislatures or the State courts the power to supplement or aid its own legislation.

Every consideration suggested in support of the ruling in *Easton v. Iowa* (188 U. S., 220) applies with emphasis to the case here presented. In the Iowa case no specific punishment for the particular offense could be pointed out. Here, when the State court is referred to the *particular statute* creating and limiting the director's liability, it freely concedes that the case made does not show that he *knowingly* violated the National Banking Act, the sole statutory condition on which his liability attaches, but asserts there is *no reason* why a supposed rule of the local forum, dispensing with this statutory element of *scienter*, should not apply to the official acts of bank directors. There is here involved the same error, so many times condemned by this court. The State court ruled that the national character of the banking system does not entitle the association and its officers to claim uniformity in the rules regulating their conduct and liabilities throughout the whole country nor exempt them from the arbitrary rules of the purely local forum. The rule of the cases cited, definitely exploding that doctrine, when applied to this record, will necessitate a reversal of the judgment of the State court.

If the State court can ignore the conditions precedent to

the director's liability prescribed by section 5239 by enforcement of a more rigorous local rule of the common law, then it is competent for the State legislature to adopt a standard of liability *by statute* variant from that prescribed by Congress. Nebraska was carved out of the territory embraced in the Louisiana Purchase, and was only recently settled and admitted as a State. There the rules of the English common law are in force only because of their adoption by local statute.* There, as in other States, the legislature has unfettered power to change or abolish any rule of the common law. If the rule abolishing *scienter* as an element of this cause of action were the creation of a State statute which the State legislature, under its power of classification, had enacted should apply in cases of deceit brought by depositors against national bank directors, based upon official statements made pursuant to section 5211, Revised Statutes of the United States, would this court sanction the usurpation? If such doctrine be tolerated, to what end will it lead? It may be presumed that each State, zealous of its local powers, will undertake to exercise them in passage of laws designed to safeguard depositors in national banks by holding directors to rigorous rules of liability. Thus the responsibilities of safeguarding the patrons of these national institutions would be assumed by the several States, and the rules of personal accountability, applicable to directors, would be as varied and changing as the States are numerous. The prime consideration to a man of affairs and pecuniary responsibility contemplating entry into the directory of a national bank is, What personal liabilities will this office subject me to in case my official conduct is upright and honest?

* NOTE.—The statute adopting the common law is: "So much of the common law of *England* as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this territory, *or with any law passed or to be passed* by the legislature of this territory, is adopted and declared to be the law within said territory" (Comp. St. Neb., ch. 5a).

Shall he seek an answer to this inquiry in the act of Congress? Or shall he be told that his liabilities will depend upon the ever-changing temper of the State legislatures and the State courts? Delegation of power to the States in such case would carry with it power to make the office of a national bank director so onerous and precarious that the national institution would be driven from the local field and supplanted by the local State bank. Such construction would be destructive of the very purpose and end of the National Banking Act. The public utility and perpetuation of the national bank, which has been so beneficent and powerful in the attainment of our financial, commercial, and industrial supremacy, depends upon its maintenance as an independent national institution. If its existence is to continue, it must be kept above the reach of the assaults of the local State governments, and the rules prescribed by Congress for its government and defining the duties and liabilities of its officers must be held of uniform application throughout the nation, and to exclude local regulation or interference.

It is pertinent, in closing the argument, to again recall the grounds upon which the State Supreme Court based its judgment of affirmance, and to show that the points urged against the judgment of the State court apply technically and precisely to the present records. There is no need to review the opinion of the State court at length. The court there prepares its own syllabus of the points decided. That the court conceded the action could not be maintained for *negligence* is shown by the first point stated in the syllabus (printed Record, p. 86), as follows:

"1. Damages resulting to a national bank, from misfeasance or mismanagement of its officers, are assets of the bank and are recoverable only in an action brought by the bank, or for the benefit of all the stockholders and creditors thereof."

That the sole ground of liability is distinctly rested upon the *official* acts of the directors done in compliance with section 5211 of the Revised Statutes of the United States is shown by the second point stated in the syllabus (printed Record, p. 86), which in Nebraska practice is prepared by the court itself, as follows:

"2. The officers of a national bank are personally liable for false reports made and published by them, *in pursuance of* sec. 5211, Rev. Stat. U. S., to the party injured thereby; and the right of the injured party to maintain the action does not rest on the Federal statute, but the common law."

It will be idle to examine the record to discover any other fact, at the foundation of this judgment, against Mr. Thompson than his alleged official acts, done *pursuant to* section 5211, of attesting four of the bank's official reports to the Comptroller. There is no pretense of proof of any other fact against him. In this behalf the opinion of the Nebraska court correctly reflects the record.

The errors of the lower courts, both State and Federal, are manifest and aggravating. It is clear that plaintiff's right of action is founded on section 5239 of the Revised Statutes of the United States; that the cause was, therefore, removable, and that the United States Circuit Court for the District of Nebraska was in error in remanding it after removal. If plaintiff in error had been accorded his clear statutory right of trial in the Federal court, judgment, on this same record, must necessarily have gone in his favor, (1) because the Circuit Court of Appeals of the Eighth Circuit had ruled that similar petitions did not state a cause of action maintainable by plaintiffs, and (2) because, in this forum, *scienter* is an indispensable element of the cause of action for deceit, and the application of this rule to the evidence, as viewed by the State court, would have necessitated a directed verdict in favor of Mr. Thompson. The errors of the State court are already sufficiently discussed.

By the proceedings shown, after the Federal courts had

alternately held and remanded the cause, the defendants were forced to trial in Seward, a country county-seat outside the district of their domicile. Mr. Thompson a man of great capabilities and of the highest character for uprightness and probity, not only of local prominence, but whose distinguished services for his country have advanced him in the diplomatic service to the rank of embassador, has been held liable, under a slanderous charge of fraud, for the amount of the deposits of plaintiffs in a national bank in which he was a mere director. He is subjected to this pecuniary loss and to this odious degradation and punishment, notwithstanding he has established his own official rectitude and his innocence of actual wrong to the satisfaction of the court which condemned him. The proceedings, so eventuating, are in total disregard of the plain provisions of the act of Congress and of the repeated mandates of this court declaring and upholding the national character of our banking system, and enforcing throughout the whole land the uniform regulations and liabilities created by the act for government of the associations and their officers.

Conclusion.

The controlling principles definitely established by the former judgments of this court heretofore cited and applied to the record under review are:

1. National banking associations are utilities of the national administration, created by act of Congress to provide a national bank currency secured by Government bonds, under conditions creating a strong demand for national securities, to aid in the fiscal operations of the General Government and to perform many minor administrative functions.

2. No State is competent to establish and maintain such a system and make it operative throughout all the States nor to endow it with the powers of a national administrative

agency. Sole power to create such institution is vested in Congress. The power to maintain, regulate, and preserve is an incident of the power to create, and also resides solely in the Congress.

3. The regulations prescribed by the act of Congress for government of such national institutions, defining the duties and liabilities of directors and safeguarding the interests of depositors, are of uniform operation, apply to all associations organized under the act, and necessarily exclude application of the local laws of the States, whether local statutes or local interpretations of the civil or common law.

4. Section 5239 (Rev. Stat. U. S.) requires that *knowing* and willing participation in the wrongs causing "damages to the association, its shareholders or depositors," must be shown, and this fact is made a condition precedent to the directors' liability for official acts and an essential and indispensable element of the cause of action.

5. If section 5239 gives legislative sanction for employment of common-law action for *damages* against directors, its own terms definitely restrict their application to cases in which the director participated in the wrong *with guilty knowledge* and makes proof of a *scienter* indispensable.

6. Application of the rules of the local State forums, by which the director is subjected to more rigorous standards of pecuniary responsibility than those prescribed by Congress, implies the power of the States to make the burdens of directors so onerous and their situation so precarious as to be prohibitive of the maintenance of the national associations within the States. Such a rule would make the success of the national scheme of banking dependent upon the good will and indulgence of the States, and, in the end, would invite prohibitive State legislation, as was shown in *Osborn v. Bank of the United States.*

7. The judgment of the Supreme Court of Nebraska, under review, definitely repudiates the authority of section 5239 of the Revised Statutes of the United States, and holds the authority of Congress in contempt upon a subject over which the Constitution makes the power of Congress supreme and exclusive.

The judgment below is, therefore, violative of the act of Congress and of article VI, section 2, of the Constitution of the United States, making the Constitution and the laws of the United States made in pursuance thereof the "supreme law of the land" and binding upon "the judges in every State." For the reasons above assigned, the judgment of the Supreme Court of Nebraska should be reversed.

Respectfully submitted.

HALLECK F. ROSE,
Of Counsel for David E. Thompson,
Plaintiff in Error.

LINCOLN, NEB., *December* 18, 1906.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
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CLERK.

No. 230

CHARLES E. YATES ET AL., PLAINTIFFS IN ERROR,

vs.

JONES NATIONAL BANK, DEFENDANT IN ERROR.

No. 231

CHARLES E YATES ET AL., PLAINTIFFS IN ERROR,

vs.

UTICA BANK, DEFENDANT IN ERROR.

No. 232

CHARLES E YATES ET AL., PLAINTIFFS IN ERROR,

vs.

THOMAS BAILEY, DEFENDANT IN ERROR.

No. 233

CHARLES E YATES ET AL., PLAINTIFFS IN ERROR,

vs.

BANK OF STAPLEHURST, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR OPPOSING MOTION TO DISMISS, AND REPLY TO DEFENDANT'S BRIEF.

J. W. DEWEESE,
FRANK E. BISHOP, AND
HALLECK F. ROSE,
Attorneys for Plaintiffs in Error.

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J. W. DEWEESE, FRANK E. BISHOP, AND HALLECK F. ROSE,
Attorneys for Plaintiffs in Error.

BRIEF OF PLAINTIFFS IN ERROR OPPOSING MOTION TO DISMISS OR AFFIRM, AND REPLY TO DEFENDANT'S BRIEF ON THE MERITS.

I.

Statement.

On the eve of the hearing, defendants have moved to dismiss, or affirm, and have supported the motions with an

elaborate brief. We do not here attempt a re-statement of the case. In our brief on the merits, we have shown that the pleadings, evidence, and assignments of error were sufficient to refer to the state supreme court for decision the rights claimed by plaintiff in error under an act of Congress. We showed also that the state supreme court necessarily held, on the question of practice involved, that the proceedings taken by plaintiff in error were sufficient to raise the federal questions, and that they were definitely adjudicated adversely to the contention of plaintiffs in error. Our former brief, therefore, exhibits sufficient of the record to show that this court has jurisdiction to review the judgment on writ of error, pursuant to section 709, Revised Statutes of the United States, as that section is interpreted by this court. In the absence of any proceeding questioning the jurisdiction, the mere exhibition of the record was deemed sufficient. But since counsel now question the sufficiency of the record to raise the federal questions, we shall present the cases which definitely sustain the jurisdiction.

We shall not attempt the same latitude of inquiry covered by the brief in support of the motions; but shall disregard the authorities and suggestions in that brief directed to the points (1) that an order by a U. S. circuit court to remand a suit removed from a state court of *original* jurisdiction before trial is not reviewable, and (2) that to justify removal from the state court of *original* jurisdiction, because the suit involves a federal question, the presentation of such question must appear from the plaintiff's petition, and can not be aided by averments contained in the petition for removal or in the answer of defendant. Juris-

diction is here asserted only under section 709 Revised Statutes of the United States. The reasons for conferring jurisdiction upon this court to review *final judgments* of the state courts of last resort are widely divergent from those authorizing a removal or transfer from the courts of original jurisdiction before judgment. One statute confers appellate powers, and the other confers original powers. Generally, the state courts have concurrent jurisdiction with the federal courts to enforce rights arising under federal laws. The state courts are the forums most convenient to the parties, and acts of Congress confer on them exclusive original jurisdiction (except as otherwise specifically provided) in all cases where the amount in controversy does not exceed $2,000. It is presumed that the state courts in such cases will correctly interpret the federal statutes and enforce the rights claimed thereunder. So the policy of Congress has been to very greatly limit and restrain the right of removal, the mere transfer of controversies before trial, to the circuit courts of the United States. The national government having adopted that policy in respect to removal, the system of the federal judiciary would be wholly incomplete but for section 709 giving authority to this court to revise the *final judgments* rendered by the state courts denying rights asserted under authority of the government of the United States. It is by virtue of the jurisdiction to review and revise such judgments conferred by section 709 that the supremacy of the federal authority, declared by the constitution, can be maintained in such cases. It is under this latter authority alone that jurisdiction is here invoked. The other questions discussed by the briefs supporting the motion are purely academic and have no bearing upon the controversy,

except as the form of their presentation may be edifying to the members of the court and tend to display the learning of counsel. We shall limit our review of the cases to those which involve the one question of the power of this court to review *final judgments* rendered by the state courts of final authority.

II.

All that is necessary to sustain jurisdiction under the present writ is that the record show the federal right to have been claimed in the state court in such form as to refer it to that court for decision.

That the state court assumed the question to have been sufficiently raised, and actually decided it, is well-nigh, if not wholly, conclusive upon this court, of the fact that the federal right was sufficiently set up and claimed by plaintiffs in error in the state court.

The sole claim of jurisdiction, as above stated, is under what this court has repeatedly termed the *third clause* of section 709, Revised Statutes United States. That clause is as follows:

"A final judgment or decree in any suit in the highest court of the state . . . [third clause] where any title, right, privilege, or immunity is *claimed* under the constitution, or any treaty or statute, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up *or claimed*, by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

Some of the earlier decisions gave undue prominence, and almost controlling force, to the words "specially set up," employed in the clause quoted. That construction, however, was obviously more narrow and strict than the terms employed in the entire section warranted. The precedent condition, which precedes the last quoted words, required only that the right, etc., be "claimed" under a statute of the United States, and that when the decision is against the privilege so "specially set up *or* claimed," the Supreme Court shall have power to re-examine, etc. Manifestly, the statute intends to confer jurisdiction to review such judgments in all cases where the right is actually claimed and denied by the judgment. By the precise terms of the statute, it is sufficient if the federal right is either "specially set up *or* claimed." For many years this court has followed the interpretation last suggested.

No particular form of words or phrases has ever been adjudged necessary in which the claim of federal rights must be asserted in the state court. It is sufficient if it appears from the record that such rights were either specially set up *or claimed* in such manner as to bring them to the attention of the state court and refer them to that court for decision.

California National Bank v. Kennedy, 167 U. S. 362–71, was a suit to enforce the liability of stockholders in a savings bank created by the laws of California. A national bank was alleged to be such stockholder and was adjudged liable, as such, by the state courts. The statement of the case prepared by Mr. Justice WHITE shows that the only averments in the answer claiming any right under the federal statute were:

"A demurrer to the amended complaint was overruled, and the California National Bank answered denying that it was ever the owner of any stock in the savings bank, and alleging that if any such stock was ever issued to it, it was issued without due authority from the bank in its corporate capacity and without authority of law. The answer also averred that the bank never acquired 'in the usual course of business or now has, as owner, any stock with the said defendant the California Savings Bank.'"

In holding this very general averment to be a sufficient foundation for the prosecution of a writ of error to review the question whether a national bank had, by the national banking act, power to hold stock in another corporation, Mr. Justice WHITE (*Ib.*) said:

"The answer averred that if any stock of the savings bank appeared to have been issued to the national bank, it was 'issued without authority of this corporation defendant and without authority of law.' In view of the fact that the defendant was a national bank deriving its powers from the Statutes of the United States, the averment that a particular transaction of the character of the one in question, if entered into, was without authority of law, can in reason be construed only to relate to the controlling and governing conduct of the corporation, that is, the law of the United States."

In recognizing the fact that the supreme court of the state had itself specifically decided the question, to be controlling, the opinion states (*Ib.*):

"The supreme court of the state interpreted the case brought to it from the court below as presenting the question of the power of the corporation under the law of the United States to become a stockholder in a savings bank, for in the opening sentence of its opinion it says: 'The California National Bank, one of the defendants, has ap-

pealed upon the ground that by virtue of the statutes under which it is organized, it had no power to become a stockholder in another corporation, and that its act in becoming such stockholder is so far *ultra vires* that it can not be made liable for any portion of the indebtedness of the corporation.'"

Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530–40, involved the question of whether the rule of the federal courts controlled the state court as to allowance of attorney's fees on an injunction bond given in the federal court, where the action for its breach is brought in a state court. In holding in favor of the right of this court to review the judgment of the state court, Mr. Justice WHITE in the opinion, said:

"But it is equally true that even although the allegations of federal right made in the state court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a federal nature was brought to the attention of the state court, yet if the state court in deciding the case has actually considered and determined a federal question, although arising on ambiguous averments, then, a federal controversy having been actually decided, the right of this court to review obtains. *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 660. All that is essential is that the federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226. And of course, where it is shown by the record that the state court considered and decided the federal question, the purpose of the statute is subserved. And so controlling as to the existence of the federal question is the fact that it was actually considered and decided by the state court, that it has been held, although the general rule is that the raising of a federal question in a petition for rehearing in the highest court of the state is too late, yet

when a question is thus raised, and it is actually considered and decided by the state court, the right to review exists. *Mallett v. North Carolina*, 181 U. S. 589, 592.

"Now, it plainly appears that the Kansas City court of appeals considered that there was presented to it for decision the question whether, in an action brought in a state court on an injunction bond given in a court of the United States, the state court was bound to apply to such a bond the rule prevailing in the courts of equity of the United States, *viz.*, that attorneys' fees are not a proper element of damages. We say this is undoubted, since the opinion of Kansas City court of appeals recites that such was the contention, and the court proceeded to consider and decide it. That this contention involved a claim of immunity under an authority exercised under the United States, reviewable in this court, we have recently decided in *Tullock v. Mulvane*, 184 U. S. 497. True it is that the Kansas City court of appeals held, contrary to the rule announced in the *Tullock Case*, that the state court was not bound to apply the rule of damages prevailing in the courts of the United States, and in effect while so concluding decided that the claim that the bond should be enforced according to the rule prevailing in the courts of the United States involved no federal question: but the fact that the state court, whilst deciding the federal question, erroneously held that it was not a federal one, does not take the case out of the rule that, where a federal question has been decided below, jurisdiction exists to review. The result of the contrary doctrine would be this, that no case where the question of federal right had been actually decided could be reviewed here if the state court, in passing upon the question, had also decided that it was non-federal in its character. The assertion that a federal right was not raised below is therefore without merit."

In *Swearingen v. St. Louis*, 185 U. S. 38–47, Mr. Justice PECKHAM, in an opinion denying jurisdiction upon the particular record, said (pp. 45–46):

"We do not hold that it was necessary to plead the claim in order to show it was specially set up, but it must have been so referred to and mentioned as to show that it was present in the minds of the parties claiming the right or must have been in some way presented to the court."

In *Home for Incurables v. New York*, 187 U. S. 155–58, Mr. Justice HARLAN, after quoting the opinion in *Parmalee v. Lawrence*, 11 Wall. 36, to the effect that the conflict between the state law and the Constitution of the United States must "appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the ruling of the court," or "it must be that such a question was necessarily involved in the decision, and that the state court would not have given a judgment without deciding it," added:

"Later cases in this court have expressed the additional thought that if the highest court of the state assumes that the record sufficiently presents a question of federal right and decides against the person claiming such right, we will look no further, and will proceed to a consideration of that question, unless the decision is made to rest, in part, upon some ground of local law, sufficient enough in itself to sustain the judgment, independently of any question of federal right."

In *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 308–9, the CHIEF JUSTICE, while denying jurisdiction upon the particular record presented, said in the opinion:

"If the highest court of a state entertains a petition for a rehearing, which raises federal questions, and decides them, that will be sufficient (*Mallett v. North Carolina*, 181 U. S. 589); or if the court decides a federal question which it assumes is distinctly presented to it in some way. *Home for Incurables v. New York*, 187 U. S. 155; *Swear-*

ingen v. St. Louis, 185 U. S. 46. Jurisdiction may be maintained where a definite issue as to the possession of the right is distinctly deducible from the record and necessarily disposed of, but this can not be made out by resort to judicial knowledge."

In *Green Bay & M. Canal Co. v. Patten Paper Co.*, 172 U. S. 58–82, Mr. Justice SHIRAS, expressing the opinion of the court in favor of jurisdiction on the particular record, said:

"But no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court. 'The true and rational rule,' this court said in *Bridge Proprietors v. Hoboken Land & Improv. Co.*, 1 Wall. 143, 'is that the court must be able to see clearly from the whole record that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' . . . If it appear from the record by clear and necessary intendment that the federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient."

In *Erie Railroad v. Purdy*, 185 U. S. 153, the opinion by Mr. Justice HARLAN, while denying jurisdiction upon the record before the court, said:

"So, if the highest court of the state, by its final judgment, sustains the validity of a state enactment drawn in question there as repugnant to the Constitution, treaties, or laws of the United States, or denies a right, privilege, or immunity specially set up or claimed in that court for the first time under the constitution or any treaty, statute,

or authority exercised under the United States, this court could review that judgment, *although no federal question was distinctly raised or insisted upon in the trial court.*"

In *Leigh v. Green*, 193 U. S. 85, Mr. Justice DAY in the opinion said:

"A motion is made to dismiss because the claim of impairment of a right secured by the fourteenth amendment was not made in the courts of Nebraska until the motion for rehearing was filed in the supreme court. We are unable to discover a specific claim of this character made prior to the motion for rehearing. In the motion reference is made to the failure of the Nebraska supreme court to decide the claim theretofore made that the statute of Nebraska was unconstitutional because of the alleged violation of the right to due process of law guaranteed by the 14th amendment to the Constitution of the United States. Be this as it may, the supreme court of Nebraska entertained the motion and decided the federal question raised against the contention of the plaintiff in error. In such case, the question is reviewable here, although first presented in the motion for a rehearing. *Mallett v. North Carolina*, 181 U. S. 589."

In *Carter v. Texas*, 177 U. S. 841, it was said in the opinion by Mr. Justice GRAY:

"But the question whether a right or privilege claimed under the constitution or laws of the United States was distinctly and sufficiently pleaded and brought to the notice of a state court is, itself, a federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state."

Among many other cases in which this court held jurisdiction under section 709, where the record showed the federal right to have been first set up in assignments of

error, after judgment had been rendered in the lower court, are *Meyer v. Richmond*, 172 U. S. 81–101 (per Mr. Justice McKenna), and *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (per Mr. Justice Harlan).

It is needless to extend the references. The cases above referred to destroy the argument against jurisdiction presented by the brief of defendants. Under the rule of these cases, it is entirely certain and obvious that the present record involves an interpretation and construction of an act of Congress, and that the final judgment in the highest court of the state was against the contention of plaintiffs in error upon the rights claimed thereunder. It is not disputed that the plaintiffs in error were, in doing the precise acts charged against them as the foundation of the action, officiating as directors of a national banking association, and were discharging duties specially enjoined, and exercising powers expressly conferred, by an act of Congress. The answers in the court of original jurisdiction so alleged; and defendants in error, in attempting to make out their cases in the trial court, adduced documentary proofs to establish this fact. Since the National Banking Association was the creature of the act of Congress, and since that act created the offices of directors and defined their powers, duties, and liabilities, the issues made by the pleadings and proofs involved, essentially and necessarily, a determination of whether the liabilities of plaintiffs in error were governed by the act of Congress. And this question, inherent in the character of the issues made by the pleadings and proofs, was distinctly and definitely adjudicated by the supreme court of Nebraska. That court assumed that the proceedings taken by plaintiffs in error

were sufficient, under the rules of procedure governing its own practice, to raise the federal questions and refer them to the court for its decision. So the state court definitely decided the federal questions here presented, and its Chief Justice, finding these questions not only to have been raised sufficiently and decided in the state court, but to have been well assigned in the proceedings taken for their review, himself allowed the writ of error upon which the case is now pending in this court. The record exhibiting the facts recited confers jurisdiction upon this court to review the judgment, under the doctrine of the cases above cited.

It further appears by the record that the *trial* court definitely passed upon all of the federal questions claimed by plaintiffs in error and presented by the assignments of error to this court. In our original brief, we quoted sufficient of the answer to show the federal rights to have been claimed in the pleadings. The trial court, by instruction 7 (printed record, p. 30) stated the elements of plaintiff's cause of action, upon which plaintiff had the burden of proof, as follows:

"In other words, the burden is upon the plaintiffs severally to show that the defendants severally published or caused to be published or participated in the publication of statements of the condition of the Capital National Bank, from time to time, during its existence, as by the plaintiffs severally alleged; to show that the plaintiffs, each for himself or itself, relied upon the truth of said statements of the condition of said bank, and to show that such statements were untrue, that is to say, that the bank was insolvent, or that its assets were not truly stated, or that its liabilities were understated to such degree and ex-

tent as to impair its solvency. Given. Defendants severally except. S. H. Sornberger, Judge."

The above instruction definitely and entirely excludes the element of *scienter*. It is needless upon this record to distinguish and refine as to the character of proof admissible to show the element of scienter—whether by direct proof of defendant's knowledge of the falsity of the statement, or by proof of circumstances showing that, in the ordinary and usual course of business, defendant ought to have known—whether this element must be established by proof of actual knowledge of the falsehoods, or may be sufficiently established by proof of wanton recklessness and heedlessness of whether the statement was true or false. This is so, because the trial court definitely and entirely excluded scienter from the enumerated elements of the cause of action. The above omission of scienter from the elements of the cause of action is emphasized by instruction 9 (printed record, pp. 30–31) quoted in our original brief, directing the jury that it was not material whether the director had knowledge that the report was false.

On the other hand, the present plaintiffs in error, Thompson, Yates, and Hamer, joined in a request to the court to give an instruction embodying the element of scienter. The record of this request (printed record, p. 39) is as follows:

"Instructions requested by defendants Thompson, Yates, Hamer, and Walsh . . . 6. The jury are instructed that if you find from the evidence introduced in reference to any of the directors named in any one of such cases that such director *did not knowingly* violate any of the requirements of the national banking act under which he was act-

ing as such director, or acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant. Refused. Exception by J. W. Deweese for Walsh estate and the directors. S. H. Sornberger, Judge."

In the motion of Hamer's administratrix for a new trial (printed record, p. 45) and of Yates (printed record, p. 48) and of Thompson (printed record, p. 50) the 13th assignment directed to the trial court is: "The court erred in refusing to give instruction No. 6 requested by this defendant." Upon the foundation thus laid in the trial court, the petition in error of Mr. Thompson, addressed to the state supreme court (printed record, p. 7) contained the following assignment of error:

"7th. The court erred in refusing to give the sixth paragraph of the instructions requested by the defendant below, number 6th, wherein the duties and liabilities of directors of national banks was defined in accordance with the provisions of the national banking act."

Identical assignments are found in the petitions in error of Yates (printed record, p. 3) and of Hamer's administratrix (printed record, p. 5).

Again, the trial court, by instruction 16 (printed record, p. 33), defined and submitted to the jury the issue of negligence as follows:

"16th. You are instructed that proof that a president or cashier misappropriated or embezzled funds of the bank or falsified the books of account is not of itself sufficient to establish *actionable negligence against the directors* who

have not participated therein, but if such embezzlement, misappropriations, or falsifications are of such great extent and are of such long continuance as would have, upon reasonable examination, challenged the attention of an ordinarily prudent business man, then you would be justified in finding that the directors were charged with notice of such misappropriation or embezzlement and falsifications. Given. Defendants severally except. S. H. Sornberger, Judge."

In the separate motions for a new trial by Hamer's administratrix (printed record, p. 46), Yates (printed record, p. 49), and Thompson (printed record, p. 51) the forty-first assignment is: "The court erred in giving the 16th instruction on its own motion to the jury, numbered 16." And in the several petitions in error, the fifth assignment (printed record, pp. 2, 3, 5, 7) is as follows:

"5th. The court erred in giving to the jury the 16th paragraph of its charge to the jury, numbered 16, where he undertakes to define the actionable negligence of a director of the bank in not discovering the embezzlement of funds by the president of the bank or of the cashier, thus fixing a liability not recognized by the law, fixing and defining the duties of directors of national banks, and in direct violation of the principle and requirements specified in sections 5239, and other sections, of the national banking act."

Thus we have read from the record that the assertion of the federal rights was specially set up and claimed in the trial court (1) by answer, (2) by proofs, (3) by requested instructions, (4) by exceptions to instructions given, and (5) by assignments of error in the motion for a new trial. These claims, upon the foundations thus laid in the trial court, were specifically set up and claimed in the petitions

in error directed to the supreme court of the state. The judgment of the state supreme court necessarily decided them, and the court expressed its views upon them adversely to the contention of plaintiffs in error; and finally, the chief justice, recognizing such questions to be inherent in the record and judgment, allowed the writ of error. If, upon such a record, this court can not, upon a writ of error, review the judgment of the state supreme court upon these questions, it may as well relinquish all appellate powers attempted to be conferred by section 709 of the Revised Statutes, and announce that it is without authority to maintain the constitutional declaration that the constitution, and the laws of the United States made in pursuance thereof, are the supreme law of the land, and that the judges in every state are bound thereby. On the above references, the repeated assertions, in the brief supporting the motions to dismiss, that the federal rights involved were not claimed at every stage of the proceedings had in the state court, are shown to be entirely unfounded, if not indeed uncandid. There is, therefore, no merit in the contention that this court is without jurisdiction, and it is clearly the duty of the court to consider the causes upon their merits.

III.

The decision of the state court does not rest upon any ground of local law sufficient in itself to sustain the judgment independently of the federal rights asserted.

We have already shown that the instructions of the trial court definitely eliminated the element of scienter from the cause of action. The verdict was responsive to the in-

structions. It does not, therefore, include a finding that plaintiffs in error knew the reports to be false, nor that defendants made any of the statements recklessly and without any heed as to whether they were true or false. The findings of fact embodied in a general verdict and, implied from it, are to be deduced from the issues shown by the record to have been actually submitted for the finding of the jury. The record here not only shows a failure to submit the element of scienter, but that the jury was directed affirmatively that the fact of knowledge was immaterial. The federal right claimed was that the statute made scienter a necessary element of the cause of action. In the state supreme court, whose judgment is under review, the issue was squarely presented that the judgment below was erroneous because it excluded the element of scienter, claimed by plaintiffs in error to have been made a necessary ingredient of the cause by the act of Congress. In order to sustain the judgment, the supreme court necessarily held against the contention of plaintiff in error upon the federal right asserted. The decision does not rest upon any mere rule of local law sufficient in itself to sustain the judgment, exclusive of the federal right asserted. The exclusion of scienter is the exclusion of the federal right.

In order to suggest that there were frauds alleged against plaintiffs in error and proved at the trial, sufficient to support the judgment, that were wholly outside of their official acts of attesting the reports to the comptroller of the currency, counsel for defendants have mentioned three items: (1) a postal card message of the cashier found in the printed bill of exceptions at page 195; (2) a published business card run in a newspaper appearing

in bill of exceptions at page 25; and (3) the averments in the petition that defendants had conversations with the plaintiffs in error in which the latter represented that the bank "was thoroughly safe and sound," and that, for all that appears in the printed evidence, these averments of oral representations may have been sustained by the proofs.

Let us examine the *first* suggestion referred to, which is made in the brief supporting the motions to dismiss at pages 28 to 31. On January 17, 1893, according to the testimony of Jones, the credit balance of the Jones National with the Capital National was upwards of $17,000. On that day, Jones ordered a remittance from this balance of $5,000 to the Chemical National Bank of New York. The postal card referred to is an acknowledgment of the receipt of this order of transfer on a printed form in use by the Capital National Bank and a report of the remittance made. The card reached the postoffice at 1:30 A.M. January 17. We are told by counsel in the brief that the bank failed in fact on January 19. In the ordinary course of business by mail, the New York remittance made from Lincoln would not reach its destination, particularly if it went through the New York clearing house, until after the suspension of the remitting bank. The suspension found this item in transit. As is always true in cases of the failure of a financial or commercial concern, payment of the items in transit is suspended, and banks to which they are sent refuse to honor them, because of the failure of the drawers. The bank that makes the remittance, in the ordinary course, charges up the item at the time it goes forward. The bank who orders the remittance made, in this case the Jones National Bank, credits its correspondent bank with the item specifically ordered transmitted. When the draft

or remittance which was in transit in this case was dishonored, the item was subject to be credited back, on the books of the Capital National Bank, to the Jones National Bank; and properly chargeable on the books of the Jones National Bank to the Capital National. The Jones National Bank, in the ordinary course of business, had credited this item in transit to the Capital National Bank, reducing the balance shown on its own books to upwards of $12,000. The dishonoring of the item of $5,000 left the real indebtedness $5,000 more than was shown by the books. In order to establish the real amount of the indebtedness to be $5,000 more than was shown by the balances on its own books, the Jones National Bank produced the original card and offered proof that the $5,000 item was not credited to its account in New York. Nothing more than what we have already stated is involved in this item of proof. The postal card was not the source of any credit. There was no pretense at the trial that it was the source of any credit or that it, in fact, embodied any false statement. It evidenced a mere attempted withdrawal by the Jones National Bank of funds *already on deposit*. The card itself was signed by the cashier, and there is no pretense that any of the other plaintiffs in error had the slightest knowledge of this detail of business. The evidence affirmatively shows that Mr. Thompson was then absent from the city. The suggestion of counsel, in the connection made, is simply ludicrous and foolish. Its characterization as an act by which the bank, through the connivance of the directors, obtained the money of the Jones National, "in no real different manner than had a burglar entered the Jones Bank with jimmy and dynamite," is the wildest delirium of actual madness.

We turn now to the *second* circumstance, the business card which is mentioned in the more pretentious brief by counsel who discuss the merits. This business card (printed evidence, p. 25) reads as follows:

"Capital National Bank, Lincoln, Nebraska. Capital $300,000. C. W. Mosher, President. H. J. Walsh, Vice President. R. C. Outcalt, Cashier. Directors: W. W. Holmes, D. E. Thompson, C. W. Mosher, R. C. Phillips, E. P. Hamer, C. E. Yates, A. P. S. Stuart. Acc'ts. solicited. Banks, Bankers and Merchants."

This general card was found printed in a separate place in one of the daily papers that contained a publication of the report to the comptroller of the currency. Under what theory it was received in evidence we cannot devise; but the only mention of it during the proceedings was merely as an insinuation that persons reading the published report in the newspaper might, elsewhere in the same paper, find the names of all of the directors of the bank. The card itself contains no statement of the resources or liabilities of the bank. It gives no item whatever affecting the bank, except to *correctly* state the amount of its capital stock. It must have been an odd situation that induced counsel to suggest that this item furnished proof of *false representations*, sufficient to sustain the judgment, on grounds outside of the *official* acts of the plaintiffs in error.

The *third* and last circumstance suggested, also in the defendants' brief upon the merits, is the allegation in the petition that the plaintiffs in error made oral representations to the defendants, and that because the whole voluminous record, including examinations of accountants

extending over a period of some weeks, was not printed in full, the printed record does not definitely show that the oral averments were not established by proof. This suggestion, however, we anticipated. (See original brief of Mr. Thompson, pp. 9–10.) The testimony of the officers of the several banks who are plaintiffs, and to whom the oral representations are alleged to have been made, is printed, as is also the testimony of Thomas Bailey, the individual defendant in error. These are the only persons, upon the face of the averments, who could have been influenced by oral representations, and they each testify definitely and unequivocally that they had no source of knowledge other than the published reports. Their testimony, printed in the record, definitely excludes the possibility of their having been influenced by any oral statements, and definitely excludes the making of any oral statements. Having already covered the point, it will not be necessary to restate the evidence. It is disappointing to find in briefs exhibiting marked ability on the part of counsel the want of candor developed by the suggestions last considered. These unfounded suggestions point, as an index, to the desperate means employed to obtain the judgments. They exhibit more zeal than candor, and can only detract from the argument.

IV.

The state court, in determining the sufficiency of the petition, declined to recognize the established rule of pleading, invoked here by defendants, which requires a specific statement of each act of fraud or neglect relied on.

Generally, the rules of pleading in actions of this character, whether the petition charges fraud and deceit, or neglect and malfeasance in office, requires that the precise acts of the defendants creating the liability be definitely and particularly set out. If the action be for fraud and deceit, the precise statements of the fraudulent acts must be set forth; if for neglect and malfeasance, the particular act or omission of the individual defendant by which improper acts of the corporation have been caused or permitted, must be set forth. Failure to comply with this requirement is generally regarded as a defect in substance and not of mere form. Prior to rendition of the present judgment, the Nebraska supreme court had recognized and applied the rule of pleading mentioned, in actions of this character (*Arnold v. Baker*, 6 Neb. 135; *Aultman v. Steinan*, 8 Neb. 113; *Clark v. Dayton*, 6 Neb. 201; *Tepoel v. Saunders County National Bank*, 24 Neb. 817; *Staley v. Housel*, 35 Neb. 164; *Crosby v. Ritchey*, 47 Neb. 924; *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb. 137; *Thomas v. Thomas*, 33 Neb. 373.)

The petitions in the present suits did not set forth or contain any particular representations alleged to have been made by Mr. Thompson, other than the report to the comptroller, of date December 28, 1886. Observance of the

above rule of pleading would necessarily have required a judgment on the pleadings and proof in favor of Mr. Thompson, because any cause of action upon the report of the year 1886 had long been barred by the statute of limitations when this suit was brought. Besides, on the theory of the petition, the report of 1886 had been superseded by new reports, made five times during each year, and the moneys originally deposited had been withdrawn long before the failure of the bank. The original report was not the source of any credit extended by plaintiffs to the Capital National Bank, represented by the deposits subsisting at date of suspension. Now the rule of pleading adverted to excluded all other statements mentioned in the petition, as other statements of like character, etc. The failure to plead the particular circumstances and to set forth the particular representations was, under that rule, a defect in substance and not in mere matters of form. The record shows that plaintiffs in error urged this rule of pleading against the sufficiency of the record of the trial court to sustain the judgment. The supreme court of Nebraska, in order to sustain the judgment below, was driven to the extremity of repudiating and denying the existence of the above stated rule of pleading which it had before enforced, in the long line of cases already cited. In this behalf, the court pursued precisely the same course as that pursued in respect to the element of *scienter*, which was not established by the proofs. Finding that a scienter was not shown, and that the directors, other than the managing officers, had acted in good faith without knowledge of falsifications, the Nebraska court, in order to sustain the judgment against the *innocent* directors of a national bank, definitely repudiated the well-established doctrine of the

common law and held that a scienter did not need to be proved. We now adduce the record proof that the Nebraska supreme court pursued the course above ascribed to it. In the written opinion delivered in this case (printed record, p. 93) the court, defining the elements of the cause of action, say:

"It was incumbent on the plaintiffs to establish by a preponderance of the evidence, (1) that the defendants *published* the statements purporting to show the financial condition of the Capital National Bank *or participated* in the publication thereof; (2) that such statements were false; (3) that the plaintiffs severally relied upon said statements and believed them to be true, and were thereby misled to their injury."

The above definition of the elements of the cause of action definitely and entirely excludes scienter. The court determined that it was not necessary to offer proof that the directors had knowledge of the falsifications in the statements, or to show that they participated in their making or publication, in wanton recklessness or heedlessness of whether the statements were true or false. Elsewhere (p. 94) the court employed the language, many times already quoted in briefs of both sides: "We do not wish to be understood to say that all of the defendants knew that such statements were false; we are satisfied that such is not the case."

To the point that the Nebraska supreme court repudiated the general rule of pleading that failure to specifically set forth the allegations or wrongful acts relied on, is a defect of substance and not of form, we quote from the same opinion (printed record, p. 94) as follows:

"The defendants appear to take the position that plaintiffs should be restricted to the two reports set out at length. We do not think so. The allegations of the petitions are sufficiently broad to admit proof of any and all statements made on and between the dates just mentioned. If definiteness and certainty required all such statements to be set out at length, *the remedy was by motion.*"

So the suggestion found in counsel's brief on the merits at pages 66 and 67, that specifications of the particular acts, in cases of this character, are required by correct rules of pleading in stating a cause of action for mismanagement and neglect, merely exhibits counsel's fine sense of irony. That such rule of pleading was recognized at the circuit in the district of Massachusetts in *Allen v. Luke*, 141 Fed. 694–97, is not material in this case. Upon mere questions of practice, the state court has final, and in this case has exercised, arbitrary authority. Its own holding in the opinion in the present suit that the want of specification in the pleadings is a mere matter of form, which can be availed of *only* by motion, is final and binding upon this court. On the present hearing, this court must test the sufficiency of the petition to raise the federal issue without regard to the rule of pleading which the opinion of the state court repudiates. Since the state court denied to plaintiffs in error the benefit of this rule, in order to affirm a judgment against them, the defendants can not be permitted to here urge, in their own behalf, the benefit of that same rule, which, if applied below, would have overturned the judgment in their favor.

V.

The element of scienter was definitely and entirely excluded by the Nebraska supreme court.

We shall now consider briefly the argument of defendants on the merits. We had not expected counsel to claim that the record, in any particular, showed the judgment to rest upon a finding that the plaintiffs in error, other than the president and cashier who were the managing officers of the bank, had any knowledge that any falsifications appeared in any of the reports, nor that any of the plaintiffs in error, other than such managing officers, participated in making or publishing any of the reports, in a manner exhibiting wanton recklessness or heedlessness of whether the financial statements were true or false. But since such assertion is found in the brief, we shall proceed to show definitely and certainly, by appropriate record references, that it is both unfounded and uncandid. At the threshold of this inquiry, we shall exhibit the theory of the liability of plaintiffs in error, as embodied in the instructions of the trial court to the jury. At request of the plaintiffs below (defendants here) the trial court gave two instructions, the record of which (printed record, p. 34) is as follows:

"1st. A director or executive officer of a national bank is responsible for the making and publication of a false report of its financial condition, though he did not personally make and publish such statement, if he in any manner participated in the making or publication thereof. A director of a national bank is presumed to know its true condition and that the law requires true statements of its affairs to be made and published by the bank from time to

time, and if one has been a director or executive officer of such a bank for a long period of time he is presumed to have a knowledge of the making and publishing of the statements of its condition, and the burden is cast upon him to overcome this presumption by competent evidence."

"2d. The jury are instructed that inasmuch as the law required that all reports made by a national bank to the comptroller of the currency shall be published *at the expense of the bank*, in a newspaper at the place where the bank is established, you have a right to consider such published report as having been introduced in evidence in this action purporting to have been signed, and whose name appears in such published reports, as having [been] authorized by such defendants, so appearing to have signed the same. Requested by plaintiffs. Given."

Instructions 10, 11, 12 and 13 of those given to the jury by the trial judge of his own motion (printed record, p. 31) are as follows:

"10th. The director of a bank who *publishes*, or *participates in the publication* of, a report of its condition, by such acts asserts that the statements contained in such report are substantially true, and he can not rely upon his ignorance of the true condition of the bank as a defense to an action, when he in such published report represents the bank to be solvent, if in truth it is not solvent and its assets are fictitious or worthless, or its liabilities so much greater than its assets as to render the bank insolvent."

"11th. It is not alleged by the plaintiffs and the proof does not indicate that all of the officers and directors of the Capital National Bank signed any one of the alleged public statements of the condition of the bank; it being required of the bank and its officers and directors that such statements should be verified by the oath of the president or the cashier, and attested by at least three of the board of directors; consequently it was not necessary in any one re-

port for each or all of the directors and officers of the bank either to sign or verify such published statement. And in the particular case of the defendant H. J. Walsh, who was, as before stated to you, vice-president of said bank, it is not in evidence that at any time he signed his name to any of the published statements aforesaid.

"It is alleged in the several petitions, however, that each and all of said defendants at divers and sundry times, either as officers or directors, made out, signed and published, or caused to be made out, signed and published, the statements in question.

"You are instructed in that behalf that it is not necessary in order to create a liability of any of the defendants, for the plaintiffs to show that any such director or officer actually with his own hand signed and caused to be published the statements alleged to have been published. It is sufficient if the plaintiffs have shown that such officer or director *participated* in making and publishing the said statements."

"12th. In determining whether or not the defendant directors or officers did in fact *participate* in any or all of the statements alleged, or shown to have been put forth and published, besides considering any testimony, if any, which goes directly to show that such director or officer personally signed the same, you are at liberty to take into consideration the length of time such officer or director had been in the service of the bank in such capacity at the time of any particular publication, the opportunities which he had for knowing the course of events in the bank, and of knowing that the bank officers and directors were issuing statements of the condition of the bank and causing the same to be published in the public newspapers, and consider from all these facts and circumstances taken together with all the other testimony touching upon the same, whether or not he in fact participated in and assented to the issuance and publication of such statements."

"13th. And although you should find from the testimony that any particular director or officer of said bank did not himself directly cause to be issued and published the statements concerning the condition of said bank, yet

if you should find that at the time such statements were being published in the public press, such director or officer was a resident of the city of Lincoln, was in a condition of health to be about giving his ordinary attention to business, and was not absent from home, that is, absent from the city of Lincoln, such facts should be taken into consideration by you, together with the other evidence and circumstances in the case in determining whether or not that officer or director knew of and participated in the issuance and publication of any or all of the statements of the condition of said bank."

In the face of this record, it required some hardihood on the part of counsel to assert that the plaintiffs in error, other than the managing officers of the bank, were held liable by the proceedings in the state court only because of having certified as absolutely true, of their own knowledge, the truth of the statements made to the comptroller of the currency. By each one of the above quoted instructions, the trial court definitely eliminated the requirement that any of the directors should have actually signed or attested the statements. The fact definitely stated to constitute the director's liability was merely that he should have "participated in the publication of a report," although it may have been signed and verified by others and did not bear his name. That proposition is embodied in the tenth instruction quoted. In the eleventh instruction quoted, the jury was told that it was not necessary for plaintiffs to show that any such director either signed the report or caused it to be published. Participation, presumed from the holding of the office, was all that was required. By the twelfth instruction quoted, the jury was given liberty to determine the fact of any participation in publishing such reports from a consideration of the length of service of the

officer, and his opportunity for knowing that such statements were made and published. By the 13th instruction quoted, the jury was directed that if "any particular director or officer of said bank did not himself directly cause to be issued and published the statements," etc., yet the jury might still inquire whether, when the statement was published, the director was a resident of the city of Lincoln and in a condition of health to attend to business, and use such facts to determine against the director the issue of whether the "director knew of and participated in the issuance and publication of any or all of the statements of the condition of the bank." By the first instruction given at request of plaintiffs below, above quoted, the jury was directed that a director "is responsible for the making and publication of a false report of its financial condition, tho he did not personally make and publish such statement, if he in any manner participated in the making or publication thereof." This language was followed in the same instruction by the direction, "If one has been a director or executive officer of such a bank for a long period of time, he is presumed to have a knowledge of the making and publishing of the statements of its condition, and the burden is cast upon him to overcome this presumption by competent evidence." The fact of actual attestation is everywhere definitely excluded as a ground of liability.

The proofs were that Dr. Hamer attested but a single report of date September 25, 1891, and that Mr. Thompson attested but one of the reports set out in the petition, dated in 1886, and but three others, which dated back many years before the failure of the bank. In the long term of service of these officers extending over a period of some nine years one of them attested a solitary report and the other four

reports, averaging one report in a period of more than two years. The law required the making of at least five such reports to the comptroller during each year. H. T. Jones, testifying as the managing officer of his bank, said he received the reports "as soon as published and the mails would arrive here from Lincoln" (printed evidence, p. 193). Without here giving references, the testimony of the other plaintiffs was to the same effect. So these plaintiffs, who kept their eyes trained on the official reports as they were issued from time to time, scrutinizing them as soon as they fell from the press, and who based their future dealings upon the condition of the bank shown by each new report, must have taken notice of any changed conditions shown therein. Each published report supersedes the prior reports. Not one of the plaintiffs claims that, in determining whether he should continue his deposit in the Capital National Bank, he looked to the antecedent reports. The proof is to the contrary. It was necessary in order to justify recovery to hold the present plaintiffs in error responsible for reports not attested by them and in the making of which they did not participate. It was further necessary, in submitting the case to the jury, to so define the rules of liability as to exclude any requirement to prove that the plaintiffs in error, who had not executed the later reports, had knowledge of any falsifications contained therein. By the testimony, if credit is given to the zealous statements of interested witnesses, the latest report, as it arrived, was the source of continuing credit, and necessarily the last report must have been the source of the credit evidenced by deposits subsisting at time of suspension. To meet these difficulties in the way of plaintiffs below, the jury was directed that a "participation" in the *publication*

of the report was sufficient to hold the non-attesting directors responsible. To make a finding by the jury of such *participation in the publication probable,* the plaintiff offered the *second* instruction above quoted, informing them that the banking act required that the reports made to the comptroller of the currency "shall be published at the expense of the bank." So it is simply untrue to state that the record shows any of the plaintiffs in error to have been held liable on the theory that any specific report, actually attested by him, was the means of deceiving the defendant in error into extending the particular credit evidenced by the deposit subsisting when the bank failed. The record references given to the instructions show the fact to be directly to the contrary. The entire argument, presented here by the brief of defendants, rests upon false premises and patent misinterpretations of the record.

Having thus recalled the particular issues raised by the record, and shown that the argument of defendant is based upon a false assertion as to the character of the issues and the rules of liability applied by the trial judge, and approved by the supreme court of the state, we shall now show that the state court did not rule in harmony with the theory that a scienter might be proved in the manner suggested in defendant's brief, and that it did not purpose or intend so to do. The holding of the state supreme court is directly to the contrary, that proof of a scienter need not be made in any form or manner. The Nebraska court held flatly that proof of guilty knowledge or wilful participation in the wrong, or any recognized equivalent of direct proof of that element which we term scienter, is not required in that state to make out a cause of action for fraud or deceit. This assertion can not be the subject of reason-

able or fair disputation, if tested alone by the present record.

The language of the state supreme court's opinion, already quoted, which defines the elements of the cause of action (printed record, p. 393) definitely excused the defendants in error from proving that plaintiffs in error had knowledge of any falsifications in the reports, or knowingly participated in any fraud, or proving any recognized equivalent of such facts. The opinion held, as already pointed out, that the plaintiffs in error did not know the statements to be false. In this respect, the holding of the supreme court was merely an approval of instruction 7 (printed record, p. 30) which also excused plaintiffs below from proving the same facts; and of instructions 10, 11, 12 and 13 given by the court on its own motion, and instructions 1 and 2 given at request of plaintiffs below (printed record, pp. 31, 32, 34), all of which in terms restricted the burden of proof, upon this element, to mere proof of participation in the publication of reports. In reaching the conclusion that the cause of action did not embody the element of *scienter*, the opinion of the supreme court, as already pointed out, referred to and followed the prior holding in *Gerner v. Mosher*, 58 Neb. 135–60, which flatly held that proof of a scienter, in any form, was not essential and was wholly immaterial.

But defendants in their brief urge (pp. 37–38) that the employment of the term *scienter* in the opinion that case, "was a mere obiter;" and that the doctrine at the foundation of that decision is consistent with the general rule requiring guilty knowledge and participation in the fraud, or its legal equivalent, to be alleged and proved. To support this position, reference is made to the article of Prof.

Lee in 20 Cyc. 26. In the footnote, from which defendant quotes, Prof. Lee, in the article referred to, gives the following exposition of the isolated holdings of the Nebraska court:

"In Nebraska it has frequently been said to be the settled law of the state that if the representation is false, and is relied upon by the plaintiff to his injury, defendant's knowledge of the falsity is immaterial and need not be proved, the courts apparently considering that the rule requiring a scienter to be shown was not in force there. And this statement of the law was deemed applicable, of course, whether the fraud was made the basis of an action or was set up by way of recoupment or counterclaim in an action to enforce a contract." (Citing the cases, including *Gerner v. Mosher*, 58 Neb. 135.)

The note then proceeds (20 Cyc. 26):

"It is doubtful, however, whether the court intended entirely to abrogate or disregard the rule requiring a scienter."

It then contains the excerpt quoted by defendants, suggesting a means of reconciling *Nebraska's discordant cases* with the general rule asserted in the text, citing the minority opinion by IRVINE, C., in *Gerner's case*, and the original Nebraska case of *Phillips v. Jones*, 12 Neb. 213, and concludes: "If this explanation is correct, the Nebraska decisions are not inconsistent with the rules of the text." Let us then determine the question by further reference to the decision of *Gerner v. Mosher* (58 Neb. 135), referred to and followed in the opinion in the case under review.

In *Gerner v. Mosher*, 58 Neb. 149, Commissioner IRVINE said:

"It is true that it has been frequently held in this court that in an action for false representations it is not necessary to aver or prove a scienter. . . . But it does not follow that one making a statement is charged absolutely with the consequences of its falsity in fact, regardless of the form of the statement and the circumstances under which it is made. Indeed, in the cases cited, the language used in one and implied in the other, is that one is liable for the consequences of the false statement only when it is made as a positive representation of an existing fact. In *Moore v. Scott*, the statement was qualified by the persons making the representation giving the source of his information as 'a reliable person' and stating his belief on that ground, and it was held that he was not responsible thereby for the truth of the ultimate statement, but only for the truth of his receiving such information from a reliable person. . . . Following the case cited (*Briggs v. Spaulding*, 141 U. S. 132), the circuit court for the northern district of New York has held that where the affairs of the bank were managed solely by the cashier, who was reputed and universally believed to be honest and capable, directors who knew little of the business of banking were not guilty of negligence because they failed to examine the books, there being no grounds of suspicion known to them (*Warner v. Penoyer*, 82 Fed. Rep. 181). This being the rule of duty imposed on national bank directors, we think it follows that where a director attests a report he does so as a director and with a view only to such knowledge of the condition of the bank as the exercise of his duties as a director imposes upon him."

Commissioner IRVINE, from whose opinion we have quoted, was not a member of the Nebraska supreme court. By the Nebraska constitution, that court is composed of three judges, of which the member whose term of service first expires is the Chief Justice. The duties of Commissioners, appointed to relieve an overcrowded docket, were *advisory* only. At page 149 (*ib.*) IRVINE, C., pointed out

that the court was against this view, which was concurred in only by his fellow-commissioner RYAN. The authoritative opinion of the court, delivered by NORVAL, J. (*ib.* 152), opens with the statement that the court does not concur in the proposition expressed by IRVINE, C., which we have already quoted. While numerous authorities are referred to and reviewed, in the opinion of the court upon this narrow question, by NORVAL, J., the gist of the holding is comprehended in the following paragraph (*ib.* 156):

"In our view, whether the attesting directors possessed knowledge of the falsity of their reports is wholly immaterial. They were in fact false and untrue, and those who deposited money with the bank or who purchased stock of the corporation in reliance upon the truthfulness of the contents of these reports *were as much deceived and damaged thereby as though the directors when they signed the reports knew them to be false.* That they were innocent of the true situation or condition of the affairs of the bank is wholly an unimportant consideration, since proof of a *scienter* is not necessary to a recovery. This court has frequently asserted that to maintain an action for false representations it is not essential that it be shown that they were intentionally or knowingly made by the defendant. This is the rule in ordinary causes, and no valid reason can be suggested or pointed out why the same principle should not apply in actions for deceit against the directors of a banking corporation. Certainly no case has come under our observation which has made an exception in their favor."

In the views expressed in the foregoing paragraph, all the judges concurred (*ib.* 160). That doctrine was therefore unanimously adopted by the court. The ground upon which *scienter* was excluded was that the consequences to the plaintiff were the same, in cases where the defendant

acted honestly, as in those cases where his conduct had been fraudulent. To quote the language of NORVAL, J., defendant was "as much deceived and damaged thereby as though the directors when they signed the reports knew them to be false."

Having held briefs in the *Gerner's case*, we are familiar with the pleadings. The report of that case (58 Neb. 139) shows that each count in the petition depended upon the making of a single specific statement, which was set out in full. In that suit, plaintiff complied with the general rule of pleading which the state court in this suit repudiated. Plaintiff there relied upon the last published report preceding his purchase of stock of the bank. The judgment there entered was a dismissal as to the directors occupying the relation to the reports relied on which is occupied in this case by plaintiffs in error, Hamer and Thompson. There was a singleness and directness of issue presented in *Gerner's case* which is entirely wanting here. Here the doctrine of *Gerner's case* has been expanded so as to condemn directors in a situation which required their dismissal, under the holding in *Gerner's case*.

VI.

Section 5239. Revised Statutes of the United States, prescribes the civil liabilities enforcible against national bank directors for official acts done contrary to the requirements of the national banking act.

The legal issue, whether section 5239 prescribes the civil liabilities incurred by directors because of official acts done contrary to the requirements of the national banking act, is definitely raised by the record. The antecedent refer-

ences establish that such issue was raised. The rule of liability created by the section referred to, as claimed by the plaintiffs in error, was denied by the highest court of the state. The record refers that question to this court for decision. In deciding that question, the mere form of the remedy available is not a material consideration. It may be conceded that the liability imposed by the statute is enforcible in a common law action of deceit. It may further be conceded that in the forum selected in the present suits the local interpretation of the common law excludes the element of the directors' *knowledge*. But existing rules of the common law do not restrain the powers of Congress. When legislating in respect to official acts of the officers of an institution of its own creation, Congress had power to change the substantive rules of liability recognized by the common law, and to write into the ancient cause of action for deceit the element of *scienter* requiring proof of the director's knowledge and wilful participation. The legal issue here raised pertains to the substantive law defining liability which must control the decision, whatever remedy may be available for enforcement of that liability. This review of the record leads back to the propositions discussed in the original briefs of plaintiffs in error. The superficial and insinuating suggestions made in the brief of defendants have been dissipated by the light which the record itself reflects, and the points originally discussed are again exposed for the court's determination.

In determining the issue touching the application, interpretation, and controlling force of the act of Congress, we do not regard the present interpretations of the rules of the common law governing actions of deceit as important.

The vital consideration is as to whether the federal statutes apply. If section 5239 (Rev. St. U. S.) applies and governs and controls the liabilities of the plaintiffs in error, it must be conceded on the face of the record that no rational interpretation of the language of that section will permit the judgments to stand. In our original brief we referred to the rule of the common law, in force at passage of the national banking act, merely as an aid to interpretation of the language used in section 5239. Prior to passage of the national banking act, this court in *Lord v. Goddard*, 13 How. 211, distinctly held that the action of deceit could not be sustained "without proving actual fraud in the defendant, or an *intention to deceive* the plaintiff by false representations;" and further that, "the simple fact of making representations which turned out not to be true, *unconnected with a fraudulent design*, is not sufficient." It was, therefore, to be expected that Congress, in establishing civil liabilities against the directors of these associations of its own creation, should preserve the elements of knowledge and wilful participation in the wrongs made the basis of the cause of action. This court is at liberty to alter its expressed interpretations of the common law rules, but is without power to amend a statute or erase from it unambiguous words controlling its interpretation. A statute, once enacted, retains its force till modified or repealed by Congress.

We note, however, that a large proportion of the references given by defendant are quotations of inflammatory rhetoric employed by *nisi prius* judges, whose utterances are not authoritative, either to establish or declare the rule of the forum. The cases referred to may, as a class, be said to be exceptions to the rule generally recognized, and

are in direct conflict with the rule of this court established in *Lord v. Goddard*, 13 How. 211, and since adhered to, preserving the element of *scienter* in actions of this character. The text writers recognize the Nebraska cases as discordant and out of harmony with the general rule applied by the courts employing the English language. It would be easy to overcome the references found in the brief of defendants by collating and reviewing the decisions supporting the generally recognized rule, without going outside of the cases cited by Prof. LEE in his article on *fraud* (20 Cyc. 24, etc.), to which both parties to this suit have made reference. But since the reliance of plaintiffs in error is upon the *statute*, such course would merely cumber the argument. We shall, therefore, hold to the argument based upon the federal statute.

A most superficial and shallow argument offered by defendants against the application to the case of section 5239 (brief, pp. 48–49) is that neither the making of false official reports to the comptroller, nor the publication of false official reports violates any provision of the national banking act. Therefore, counsel argue, since the liabilities imposed by section 5239 are consequent upon acts violative of some provisions of the title, it is not applicable to a cause founded upon the making of false official reports to the comptroller. That suggestion is strikingly discordant and inconsistent with the interpretation of the national banking act held by the state court, of which defendants had the benefit at the trial. The trial judge, *at defendant's request* (instruction 1 requested by plaintiffs below, printed record, p. 34) directed the jury that, "a director of a national bank is presumed to know . . . that the law requires true statements of its affairs to be made and

published from time to time." Having contended for and procured such interpretation to be given by the trial judge to the jury, it would seem that defendants should hardly be permitted to urge the contrary view at this time. However, the instruction quoted seemed to follow closely, and almost literally, the interpretation placed by this court on section 5211 in *Cochran v. U. S.*, 157 U. S. 286, holding that the duty of making and publishing the report is imposed upon the association itself. Section 5211 enacts that "every association shall make to the comptroller of the currency not less than five reports during each year . . . verified by the oath or affirmation of the president or cashier of such association and attested by the signature of at least three of the directors." Elsewhere in the brief, defendants contend for a very rigid interpretation of the provisions requiring the association to verify its reports as true.

The above provisions requiring the making of true reports by the association, verified as such in the manner prescribed, is supplemented by the additional provisions contained in sections 5209, making it an offense punishable by imprisonment from five to ten years to make any *false entry* in such report. Criminal liability for falsifying the report, contrary to the requirements of section 5211, is by section 5209 visited only upon the person actually making the false entry. Civil liability against the director, who knowingly participates in or assents to the falsification, as contradistinguished from the *act* of making the falsification, is imposed by section 5239. The act is thus complete and harmonious as a whole, and creates and defines the liabilities, both criminal and civil, resulting from the felonious making of the falsifications, or knowingly or wil-

fully permitting them to be made. In urging this interpretation we are by no means taking the initiative. Such is the interpretation long since placed by this court upon these various provisions of the national banking act. The following cases definitely settle this question of interpretation.

In *Cochran v. U. S.*, 157 U. S. 293, it was said in the opinion by Mr. Justice BROWN (in our first brief accredited through error to Mr. Justice WHITE):

"The argument of defendants assumes that the making of the entry and the making of the report are the same thing, whereas, in fact, they are wholly different. By section 5211, the report must be made by the *association*, and must be verified by oath or affirmation of the president or cashier and attested by the signature of at least three of the directors. But under section 5209, there is no penalty affixed to the association or its officers for making a false report, nor to the president or cashier for verifying such report. The penalty imposed by section 5209 is affixed to the one who makes any false entry in any book, report, or statement of the association; and that penalty is applicable to any officer or agent of the bank who actually makes the entry with intent to injure or defraud, or to deceive any agent appointed to examine the affairs of any such association."

The case quoted from holds merely that section 5209, prescribing criminal punishments, does not cover mere acts of verifying the published reports which are false, in contravention of the requirements of section 5211 that the reports made shall be verified as true and then attested by three directors. The penalties attaching to the directors for knowingly permitting the verification of reports which are, in fact, false, are prescribed by section 5239, and are civil liabilities, and not criminal punishments. In the

opinion of Mr. Justice BROWN quoted, reference is made to the opinion of Mr. Justice WOODS in *U. S. v. Britton*, 107 U. S. 655–70, which considers the several sections of the national banking act and interprets them together, and definitely explains the force and operation of section 5239.

In *U. S. v. Britton*, 107 U. S. 667–68, Mr. Justice WOODS, in the opinion, reviewing and interpreting the provisions of the national banking act under consideration, said:

"The counts, therefore, charge maladministration of the affairs of the bank, rather than criminal misapplication of its funds. If we hold these counts to be good, then every official act of any officer, clerk, or agent of a banking association, by which its funds are applied in a way not authorized by law, would be punishable under section 5209. For instance, section 5200 of the Revised Statutes declares that 'the total liabilities to any association of any person, . . . for money borrowed, . . . shall at no time exceed one-tenth part of the capital stock of the association actually paid in.' Section 5201 provides that no association shall make any loan or discount on the security of the shares of its own capital stock, unless such security shall be necessary to prevent loss on a previously contracted debt. If the counts under consideration are sustained, then every president, director, cashier, teller, clerk or agent of a banking association who has any part in lending the money of the association contrary to the provisions of these sections, is guilty of a criminal misapplication of its funds.

"So, by section 5137 of the Revised Statutes, the purposes for which a banking association may purchase and hold real estate are limited and specifically pointed out. If the directors of a banking association should authorize the purchase of a piece of real estate for its use, but not for purposes authorized by the statute (even though with intent to injure some corporate body or natural person), it could hardly be claimed that the directors who made the order, and the other officers or agents of the association who (with a like intent) had any hand in making the purchase or in

paying out the money of the bank therefor, would be liable to indictment and imprisonment under section 5209.

"The acts charged by the counts under consideration are precisely of the same character as those just mentioned. They are acts of maladministration of the affairs of the association by its officers. The penalty for such acts is prescribed by section 5329, which declares: 'If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title (national banks), all the rights, privileges, and franchises of the association shall be thereby forfeited. . . . And in case of such violation, every director who participated in or assented to the same shall be held liable, in his personal and individual capacity, for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.'

"We are, therefore, of the opinion that the wilful misapplication of the moneys and funds of the banking association, which is made an offense by section 5209, means something different from the acts of official maladministration referred to in section 5239, and it must be a wilful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association or some other body corporate or some natural person."

It, therefore, appears to be settled by the definite interpretations found in the decisions of this court, above quoted, that it is the office of section 5239 of the Revised Statutes to prescribe civil penalties against the directors for acts which are violative of any of the provisions of that title, and that where criminal punishments are not elsewhere prescribed, section 5239 necessarily prescribes the only liability imposed upon the directors for official misconduct amounting to violations of any provisions of the title. The decisions referred to definitely and fully sustain the argument presented in the original briefs, that to entitle a

depositor in the association to recover in this case against the directors, other than those who actually made the false entries in the reports, the depositor must show that the director did the act knowingly or knowingly permitted the falsifications to be made. To sustain the judgment, the record should show that the trial court, by appropriate instructions, imposed this burden upon the depositor. Since the record in the present case shows to the contrary, the judgments must be reversed.

The present suit involves questions touching the powers, duties, and liabilities of directors in a corporation created by an act of Congress (per SWAYNE, Justice, *Bank v. Dearing*, 91 U. S. 33), "to aid the government in the administration of an important branch of the public service." And "being such means," says Mr. Justice SWAYNE, "brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single state cannot give.'"

In *California National Bank v. Kennedy*, 167 U. S. 366, 367, it was said by Mr. Justice WHITE:

"It is settled that the United States statutes relative to national banks constitute the measure of authority of such corporations, and that they can not rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established. *Logan Co. Nat. Bank v. Townsend*, 139 U. S. 67, 73. . . . It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. *First National Bank v. National Exch. Bank*, 92 U. S. 128."

Congress imposed on the association by a mandatory statute the duty of making the reports to the comptroller of the currency, and of verifying them, in the manner stated, *first*, by the oath of a managing officer, and, *second*, by attestation of three of the directors. As the trial court instructed the jury, this statute required the making of *true* reports. Having imposed these official duties, the statute, by section 5239, very properly described the penalties, in form of civil liabilities, consequent upon their violation. The application of the statute seems hardly a debatable question. Counsel who characterize this as a "novel theory" must be so provincial as not to appreciate the functions and powers of the national government.

In this connection, we disavow any imputed claim that the validity of ordinary contracts which national banks are authorized to make depends upon the federal statute. On the contrary, we concede that the general rules governing right of property are not infringed by the national banking act. The largest share of the bank's operations are, no doubt, governed by the local laws of the states in which they do business. But the federal statutes *alone* determine whether an act of the bank is *ultra vires;* how its assets are distributable in case of insolvency; and what are its powers and public duties, and the powers, duties, rights, and liabilities, civil and criminal, of its officers. (*McClellan v. Chipman*, 164 U. S. 164; *Davis v. Savings Bank*, 161 U. S. 275; *Easton v. Iowa*, 188 U. S. 220.)

In addition to the enumerated instances in which the provisions of the federal statute are controlling and exclusive, it is also settled that where the federal statute contains any regulation requiring observance of local laws in respect to general contracts, such as the exaction of

usurious interest, and fixes a penalty for non-observance of such regulations, its provisions are exclusive (*Bank v. Dearing*, 91 U. S. 29). The federal statute is paramount, controlling, and exclusive, in so far as it speaks affirmatively, in relation to the general contracts which are ordinarily governed by the laws of the states. In respect to the corporate powers and the duties of the officers, the federal statute is the *measure* and the sole *source* of authority, implying a prohibition where an authority is not expressly granted. Under these well-settled rules the application of the statute to the present controversy can not rationally be denied.

In *McClellan v. Chipman*, 164 U. S. 356–57, Mr. Justice WHITE reiterates and harmonizes the rules above asserted. In the opinion in that case, he said:

"Two propositions have been long since settled by the decisions of this court:

"First. National banks 'are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and the liability to be sued for debts are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.' *First Nat. Bank v. Kentucky*, 76 U. S., 9 Wall. 362.

"Second. 'National banks are instrumentalities of the federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national

legislation, or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created.' *Davis v. Elmira Sav. Bank*, 161 U. S. 283 (40:701).

"These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States."

The learned and accurate exposition by Mr. Justice DAY of the law that a shareholder has the right, for a legitimate purpose, to examination into the affairs of the business in which he is part owner, and his right of discovery of the methods in which his agents are conducting his own business, found in *McGuire v. Blount*, (199 U. S. 148-59) to which we are cited by defendant, does not contravene any principle here urged. That decision involved a right of property, the right of an owner to dominion over his own property, and to participate, within reasonable limits, in the conduct of business in which he is part owner. That right, under our system, is sacred and declared by the constitution to be inviolable. It is maintained by the opinion on high grounds; but the opinion definitely recognizes every principle contended for here by plaintiffs in error, and is an authority to support their contention. Instead of contravening the act of congress, the opinion definitely asserts its supremacy. At page 159 (*ib.*) Mr. Justice DAY said:

"That the statute did not intend, in withholding visitorial powers, to take away the right to proceed in courts of justice, to enforce such recognized rights as are here involved, is evident from the language used. If the right to compel the inspection of books was a well-recognized common law remedy, as we have no doubt it was, even if included in visitorial powers, as the terms are used in the statute, it would belong to that class 'vested in courts of

justice' which are *expressly* excepted from the inhibition of the statute."

VII.

Mr. Thompson's testimony is fully and correctly stated in his own brief.

The effort in defendant's brief (pp. 96–111) to exhibit Mr. Thompson's testimony in a discrediting light hardly merits rejoinder. Wherever the record shows him to have detailed the full and complete circumstances of each transaction inquired about, so as to establish in each case its integrity, an ellipsis is used in the brief to obscure and hide the details related and explanations given. After employing this art, counsel pretends to lay naked facts together in such a way that, without explanation, they would tend to discrediting inferences. This garbled exposition of his testimony amounts merely to misrepresentation. The same testimony is fully exhibited in Mr. Thompson's own brief (pp. 9–25). The only difference in the manner of laying it before the court is that Mr. Thompson includes details which in each case, the defendant marks with an ellipsis. Mr. Thompson's brief reverts to every insinuating interrogatory and gives the detailed answers, which wipe out the insinuations. The court may trust either the record or the statements of Mr. Thompson's evidence embodied in his own brief, but will find itself obliged to discredit the garbled and insinuating exhibit furnished by the defendants.

The issue, however, as to the ultimate facts established by Mr. Thompson's testimony can hardly be regarded as vital to the decision. It will, doubtless, be sufficient, upon this hearing, that the state supreme court found, upon his

evidence, in favor of his personal integrity. His evidence was exhibited in his own brief merely to show the judgment in an aggravated light. The controlling consideration here is that Mr. Thompson was entitled to have his liability tested by the rules prescribed in the act by Congress. That right was denied to him by the state courts, and he is entitled to have the judgment reversed because of that error, without regard to whether this court might conclude his testimony sufficient to have justified a submission of the cause to the jury under a proper definition of his liabilities.

VIII.

The rule of liability which preserves the element of scienter does not contravene established doctrines of public policy.

Where liability is governed by statute, the rule of public policy at its foundation is purely a legislative question with which the courts have no concern.

The repeated assertions in the brief of defendants to the general effect that preservation of the element of scienter tends to recklessness and faithlessness on the part of directors in the discharge of official and administrative duties, that such rule leaves innocent and confiding depositors and creditors without redress for wrongs suffered, and that it will tend to weaken public confidence in national banks and lessen their efficiency as public agencies, have only the force which nervous rhetoric and passionate oratory lends to a questionable and doubtful cause. Their employment may appeal to the superficial sensibilities, but they are not deep enough to reach or persuade the deliberate judgment. Like most all mere rhetorical flourishes, they may be paraphrased and made to apply to either side of

the argument. The rule urged by plaintiffs in error does not, in fact, operate to deny depositors and creditors of redress. On the contrary, it affords them redress, but requires them, in conformity to correct ideas of business morals, to seek their redress against the wrongdoers who actually perpetrated the frauds of which they complain. Where one innocent person is defrauded, no corrective or stimulus to good business morals is offered by permitting him merely to shift his loss to another innocent person. To pursue the later course would tend only to demoralize business methods, since no man could then know that the conscious rectitude of his own conduct would afford any vindication against a charge of fraud. Let us inquire, then, what has been the policy of Congress and how well that policy has sustained this banking institution of its own creation.

In analyzing the provisions of the national banking act, the following facts will determine the policy adopted by Congress: (1) Faithfulness to official duty on the part of officers and directors of national banks is afforded by imposing penalties only upon the delinquent official. Conscious participation in or wilful assent to the violation of some provision of the banking act is, by section 5239, made the sole cause for imposition of civil penalties or civil liabilities. The policy at the foundation of the criminal punishments imposed by section 5209 is also to visit the punishment solely upon the particular officer guilty of official delinquency. This is well shown by the decision in *Cochran v. U. S.*, heretofore cited and quoted. (2) The associate officers or directors in the same institution with the guilty delinquent, who have not knowingly participated in or consented to the unlawful act, are as definitely, by

the same statutory provisions, relieved of all the penalties consequent upon any unlawful act. (3) The seventh subdivision of section 5136 authorizes national banks to exercise, by their "duly authorized officers," such powers as shall be necessary to carry on the business of banking. The oath of office of the director, prescribed by section 5147, in so far as it refers to administration of the affairs of the bank, is qualified by the clause, "so far as the duty devolves on him." If we understand the history of the statute correctly, the quoted clause was added in 1874.

So it is apparent that Congress deemed visitation of punishments upon the guilty officers, alone, to be a sufficient stimulus to official duty. Congress, doubtless, considered also that men of affairs and character would be free to embark their capital in such enterprises and assume official positions under regulations which exempted them from criminal punishments or civil forfeitures, so long as they did not knowingly violate any of the provisions of that act. The public policy to be pursued in the enactment of this statute creating this public agency was wholly legislative. Congress had power, either to adopt the policy shown, or to embody in the act the dragonian policy here urged by the defendants. After enactment of the statute, it was the privilege of Congress to observe the efficacy, or want of efficacy, of the policy adopted in the original act, and to amend or alter it in any respect in which the test of experience had shown it to be deficient. Time has demonstrated that the enactment adopted is wise and prudent. The legislative policy adverted to has led men of affairs and prudence to invest largely in the stock of national banking associations and to enter their directory, so that

the act itself has developed, probably, the greatest and most efficient financial system in the world.

It must not be overlooked, in this connection, that the innocent depositors and creditors were not lost sight of by Congress. They were given specific and special remedies against such officers as knowingly violated the provisions of the title to their damage, and a sacred fund, set apart for their exclusive use, in the extreme and occasional cases of insolvency, was provided by assessments upon all the stockholders equal to the amount of the capital stock, which, in ordinary cases, would reach solvent debtors other than the adventurous officers, who, in many instances, are ruined by the failure of the bank. Congress provided an agency for the speedy collection and distribution of this fund.

The questions discussed in our original briefs are, therefore, controlling and decisive of the case, and their application to the record will require a reversal of the judgment.

Respectfully submitted,

J. W. DEWEESE,
FRANK E. BISHOP, AND
HALLECK F. ROSE,
Counsel for Plaintiffs in Error.

Lincoln, Neb., March 1, 1907.

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Office Supreme Court, U. S.
FILED.
MAR 19 1907
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
v.
JONES NATIONAL BANK, *Defendant in Error*. } No. 230.

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
v.
UTICA BANK, *Defendant in Error*. } No. 231.

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
v.
THOMAS BAILEY, *Defendant in Error*. } No. 232.

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
v.
BANK OF STAPLEHURST, *Defendant in Error*. } No. 233.

SOME NEW REFERENCES.

We desire to call attention to a case not heretofore referred to, that of Utley v. Hill, 155 Mo. Rep. 274, where the court considered the liability of directors of a State Bank, based on a report to the Secretary of State, which

report had been made by the Banking Association as required by a State law.

The question involved was whether the directors in attesting the report could be held liable to a depositor in a common law action for deceit, on the charge of false statements.

The court, in considering this question used the following language, page 274:

"Before the enactment of this statute there was no obligation on directors or officers of a bank to make any kind of a statement of the actual condition of the bank to the Secretary of State or to any one else, nor to publish any such statement in the newspapers. The obligation and duty so to do was created by the statute. The same act which imposed the duty prescribed the penalty for its violation and the tribunal before which the penalty should be enforced; that is, made it a misdemeanor, punishable on information or indictment, by fine and imprisonment. The conclusion is inevitable and unavoidable that no other penalty can be exacted or enforced than that prescribed by the act. Nor can a false statement made by directors of a bank to the Secretary of State be made the basis of a common law action for deceit. The reason is plain. The law exacts the statement; hence it is not voluntarily made. The statement is required to be made to the Secretary of State, so that he may take steps to close the bank if it is dangerous to the welfare of the people for it to continue business, but it is in no sense a statement made by the directors with intent to induce persons to deposit their money in the bank, and therefore a common law action of deceit cannot be predicated upon it. But, above all, the law imposes the duty and prescribes the punishment for a violation thereof. The law vests no right of property or of action in any one which may be vindicated by the common law, and therefore the penalty imposed by the law is exclusive, and no other remedy is open to any one."

In the oral argument of these cases there was an inquiry

from the bench, whether or not the petitions sufficiently stated a cause of action for fraud and deceit under the system of pleading in Nebraska. No particular form of pleading is required in Nebraska, other than a plain statement of facts, and we think there is no doubt that sufficient facts are alleged in the petitions to embrace a cause of action for fraud and deceit, if such allegations be segregated and construed separate and apart from the allegations of negligence and misfeasance charged against the directors of the bank. Clearly there is one cause of action for misfeasance and mismanagement alleged, and if there is another for fraud and deceit it is not separately stated and numbered as required by the Nebraska Code, but all of the facts "jumbled together" in one general averment. The rule of pleading is that a pleading will be construed most strongly against the pleader.

If the petitions are to be construed as actions for fraud and deceit it must be in face of the fact that the petitions disclose an action for negligence and misfeasance in office, as well as the fact that the cases were tried and submitted to the jury by the instructions of the court on the theory of negligence and misfeasance in office, and also on the theory of deceit. It cannot be said that the jury did not decide against the directors by reason of these instructions and the proof on questions of negligence in the management of the bank.

If the actions are held to be for fraud and deceit, the acts complained of, the things done, or neglected to be done, are all embraced in the official duty of the directors as defined by the National Banking Act. Nothing was done by the directors voluntarily to influence anybody. They attested the reports in their official capacity because the banking law required it; and did nothing, and said nothing, to the defendants in error outside of their official duty in attesting some of the reports.

A national bank director's duties and obligations are defined by his oath of office prescribed by Sec. 5147, Rev. St. U. S. This section does not require that the director take upon himself an obligation to perform "the duties which usually devolve upon directors in corporations" nor such as devolve upon them "by the common law." On the contrary, he is required to make oath that he "will not *knowingly* violate or *willingly* permit to be violated, any of *the provisions of this title*." Thus the language of the act of Congress seems to definitely exclude common law duties, and to limit the obligations of the director to a compliance with "the provisions of this title." It is true that an obligation is imposed on the director to diligently and honestly administer the affairs of the association "so far as the duty devolves upon him." But the qualification of the obligation touching administrative duties, contained in the clause quoted, is evidently intended to make that provision harmonize and concur with subdivision 7 of Section 5136, authorizing the association "to exercise, by its board of directors, *or duly authorized officers* * * * all such incidental powers as shall be necessary to carry on the business of banking." The power to delegate administrative duties to the executive officers is thus expressly conferred; and assumption of such duties by the oath of office is by the act qualified, and made to depend upon whether the directors, in exercise of their powers, retain administrative duties, or delegate them to executive officers—either of which courses they are, by the statute, permitted to pursue. Having prescribed these specifically defined duties, Congress, in the same act, very appropriately prescribed the liabilities for their violation by Section 5239. By the repeated holdings of this court, already cited, these liabilities are exclusive. So the suggestion that directors are remitted to the common law for a definition of their full official duties is wholly without merit.

Another inquiry from the bench was whether the reports made to the Comptroller were in fact false, and we fear was not sufficiently and definitely answered. The reports were true reports as taken from the bank's books. They agreed with the totals of the assets as shown in the books, but did not in every instance agree with each item of assets as kept under the headings of accounts in the bank's books. The blank forms of the reports were furnished by the Comptroller, and the headings of accounts in these blank forms did not contain some of the items of assets as shown in the bank's books. Consequently a reclassification and re-arrangement of some of the items had to be made in reports to the Comptroller.

But there was no discrepancy in the reports and the books in the statement of the assets, when thus reclassified.

The counsel for the other side claim that the reports were false because the face value of the assets as reported to the Comptroller was not realized by the Receiver in winding up the affairs of the bank. There is no doubt but that the assets did very much depreciate in value owing to the forced sale and the prevalence of a wide-spread financial panic at that time, but we do not understand that the giving of the full amount of the assets in the reports, would constitute a false report. It would be a hazardous undertaking, as well as an untrue report, if the amount of the assets as shown by the books were changed to an *estimated* value, rather than the true amount as shown by the books.

The fact that Mosher, the President of the bank, issued certificates of deposit to the State Treasurer in amounts of $50,000 and $100,000, and entered the transaction on the books of the bank as certificates for $5.00 and $10.00 and the reports of the bank to the Comptroller were made

up on the entries as they appeared on the books, could not bind nor affect the directors of the bank who were innocent, as they all were, of that process of stealing. The facts pertaining to the amounts of such certificates never developed until after the failure of the bank. We rely upon the numerous decisions of the courts cited in our briefs for a reversal of the state court's judgment.

Respectfully submitted,

HALLECK F. ROSE,
J. W. DEWEESE AND
F. E. BISHOP,
For Plaintiffs in Error.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

Office Supreme Court
FILED
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JAMES H. McKE

CHARLES E. YATES, ET AL.,
Plaintiffs in Error,
vs.
JONES NATIONAL BANK,
Defendant in Error.
No. 230

CHARLES E. YATES ET AL.,
Plaintiffs in Error,
vs.
UTICA BANK, *Defendant in Error.*
No. 231

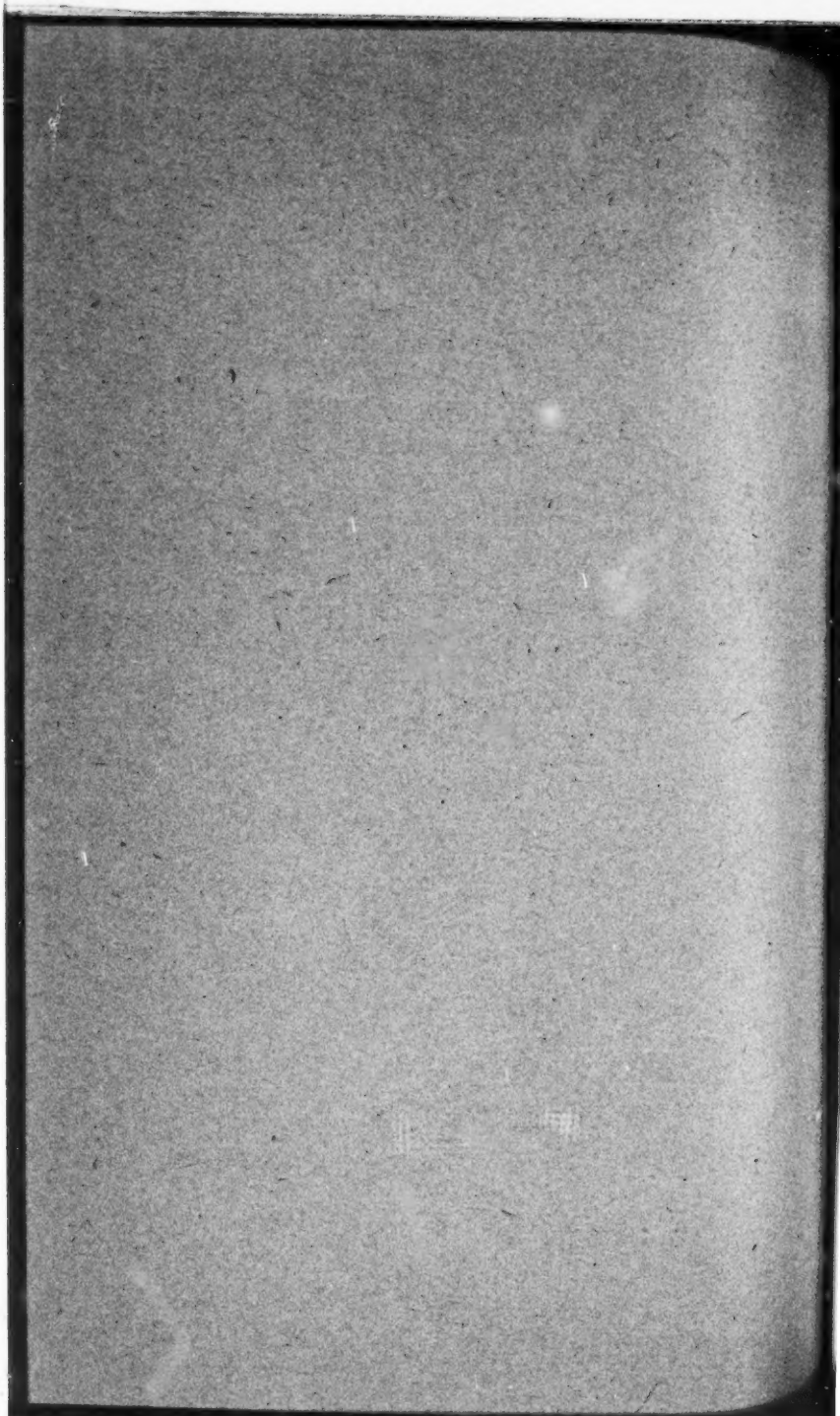
CHARLES E. YATES, ET AL.,
Plaintiffs in Error.
vs.
THOMAS BAILEY, *Defendant in Error.*
No. 232

CHARLES E. YATES ET AL.,
Plaintiffs in Error,
vs.
BANK OF STAPLEHURST,
Defendant in Error.
No. 233

ERROR TO THE SUPREME COURT
OF NEBRASKA

BRIEF OF DEFENDANTS IN ERROR UPON THE SEVERAL MOTIONS TO DISMISS OR AFFIRM.

CHARLES L. BURR.
LIONEL C. BURR,
Attorneys for the Motions.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

CHARLES E. YATES, ET AL.,
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ERROR TO THE SUPREME COURT
OF NEBRASKA

BRIEF OF DEFENDANTS IN ERROR UPON
THE SEVERAL MOTIONS TO DISMISS
OR AFFIRM.

Brief of Defendants in Error upon the several motions to Dismiss or Affirm.

May It Please the Court:

A motion to dismiss or affirm has been filed and duly served on plaintiffs in error in each one of the above entitled cases. We only print a copy of the motion in case No. 230. It is as follows:

Motion to dismiss the writ of error in this action, or to affirm the judgment of the Supreme and District courts of Nebraska.

Comes now the defendant in error by its counsel appearing in that behalf and moves the court to dismiss the writ of error in this action, to the Supreme court of the state of Nebraska for the following reasons, to-wit:

1. The petition of the defendant in error did not in the record specially allege, set up or claim a federal right or federal law, or a federal question, nor did the defendant now the plaintiff in error, specially allege a right, privilege or immunity in or by their said answer.

2. The separate answer of the defendant, now plaintiff in error, did not allege specifically, set up or claim herein, a federal right, claim, privilege, immunity or a federal question, nor did plaintiff in error specially plead or claim any right, privilege or immunity of a federal nature as belonging to him, nor did he specially set up, or base any claim, right, privilege or immunity at the trial or in the record, at the proper time in the proper way.

3. The Supreme court of the state of Nebraska, nor the district court in which said action was tried, did not decide a federal law necessarily involved in this action upon

which the recovery of judgment by the defendant in error against the plaintiff in error, depends.

4. The circuit court of the United States for the District of Nebraska, duly remanded said action from the circuit court of the United States for the District of Nebraska to the district court of Seward county, Nebraska, on two separate occasions and each one of said orders are final and conclusive, and this court has no jurisdiction to review or revise said orders of remand.

5. The state court did not decide a federal question but expressly held it was not necessary so to do, and rested its decision on the independent ground of construing the petition to state a cause of action for fraud and deceit, which decision of the state court is broad enough to maintain the judgment now complained of, nor did the answer to plaintiff in error, nor the motion for a new trial, allege or set up a right, privilege, or immunity under a federal law at the proper time in the proper way.

6 Both the circuit court of the United States for the District of Nebraska, and the circuit court of appeals for the Eighth circuit have in this action between the same parties held, that the original and amended petitions do not allege or set up a federal question, and the same has become the law of this case and this court has no jurisdiction under section 2 of the act of March 3, 1887, to review the same.

The Supreme court of the United States has no jurisdiction either of the subject matter or of the parties to this action.

And said defendant in error by counsel as aforesaid also moves the court to affirm the said judgment from which

said errors purport to have been taken, because although the record may in some manner show that this court has jurisdiction in the premises, yet it is manifest that said error proceedings are prosecuted for delay only.

JONES NATIONAL BANK,
By CHARLES L. BURR,
LIONEL C. BURR,
Its Attorneys.

Lincoln, Nebraska, February 20th, 1907.

Received copy of the above motion together with copy of brief on motion.

DAVID E. THOMPSON,
CHARLES E. YATES,
ELLIS P. HAMER, Deceased.
By J. W. DEWEESE,
FANK E. BISHOP,
HALLECK F. ROSE,
Their Attorneys.

This action was originally commenced in the district court of Seward county, Nebraska, and by plaintiffs in error removed, on two different occasions, to the circuit court of the United States, for the District of Nebraska, and upon motion of defendant in error duly remanded each time. After the action had been remanded to the state court for the first time, defendant in error by leave of the state court, amended its petition, by interlination, and plaintiffs in error removed the action again for the second time. The circuit court held the last removal good (Record No. 230, 66 to 71) but upon appeal to the circuit court of

appeals for the Eighth circuit, the action was for the second time remanded. Jones v. Mosher et al., 107 Fed. 561. Also see Bailey v. Mosher et al., 74, Fed. 15. And this brings us to the first point made in the motion to dismiss or affirm, namely, that the action having been twice remanded from the federal to the state court, this court has no jurisdiction to review the several orders to remand, or of the parties or subject matter of this action.

The last part of section 2 of the act of March 3rd, 1887, reads as follows:

"When any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

We view this important language in this law, as applied to the two orders remanding this action, the same as any final order or judgment in either state or federal court. Congress evidently intended that an order remanding an action back to a state court to be final, as to further proceedings, or jurisdiction in such action, precisely the same as the final order in the case at bar, from which plaintiff in error had a right to appeal from the district to the Supreme court, or from the final judgment in the Supreme court of the state of Nebraska, from which this court could issue its writ of error to the Supreme court of Nebraska.

If the two orders remanding this action to the state court are final, what right has plaintiff in error to complain

of same in the motion for a new trial, and what power, or jurisdiction, has this court to review either one of said final orders, which by this statute, passed on purpose to limit and restrict the jurisdiction of both the circuit court and of the parties to the action and Supreme court of the United States?

In re Pennsylvania Company 137, U. S. 454.

Birdseye v. Schaffer 140, U. S. 117.

Missouri Pacific Ry. Co. v. Fitzgerald 160, U. S. 556.

Gurness v. Patrick County 137, U. S. p. 141.

Richmond & D. R. R. Co. v. Thouron 134, U. S. 45.

Mr. Justice Bradley in the opinion in re Pennsylvania Co. on p. 454 in speaking of this statute, says:

"In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case we think it was the intention of Congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive.* * * Yet the use of the words "such remand shall be immediately carried into execution" in addition to the prohibition of appeals and writs of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process."

Again it has become the law of this case that no federal question was set up or alleged in the original petition, or in the amended petition in this action. The original petition is found on pp. 60 to 66, Record No. 230, and the petition to remove the case out of Seward county district court is found on pp. 66 to 70, Record No. 230.

It was held in this action by and between these same

parties by Oliver P. Shiras, judge of the United States district court for the Northern District of Iowa, sitting in this action, and by Thayer, circuit judge, in the circuit court of appeals for the Eighth circuit that neither the original petition nor the amended petition made any allegation of a federal nature, as persistently claimed in the answer in the petition to remove and in the assignments of errors, and now alleged and set forth in each one of said pleadings and records herein, and that neither the original petition, the amended petition or the proceedings in removal stated a case arising under the National Banking Act, but did state and allege a cause of action for fraud and deceit under the common-law, and in the case of Bailey v. Mosher et al. 74, Fed. 16, Judge Shiras in the opinion says:

"In Hayden v. Thompson, 17 C. C. A. 592, 71 Fed. Rep. 60, it was furthermore ruled by the same court that a person legally injured by the wrongful acts of the officers and directors of a national bank, and which acts create causes of action under the principles of the common-law, may count on the common-law liability for damages caused him. Actions of this character, however, would not present controversies arising under the laws of the United States, and of them the federal courts could have no jurisdiction, either originally or by removal, if they were between citizens of the same state. The petition in the case now before the court is clearly based, not upon the provisions of the National Banking Act, but upon a liability claimed to arise under the principles of the common-law; and, as the requisite diversity of citizenship does not exist to justify a removal on that ground, it must be held that the state court rightfully refused to order a removal of the case."

Thayer, circuit judge, held in Jones v. Mosher et al., in 46 C .C. A. 174, construing both the original and amended petition in this action:

"Applying this rule to the case in hand, the result is that if the amended complaint which was filed on May 3, 1897, stated substantially the same cause of action which was stated after it was amended by interlineation on March 16, 1899, then the second petition for removal was filed too late to oust the jurisdiction of the state court, and we need not concern ourselves with the question, whether either one of the complaints, original or amended, stated a cause of action arising under federal laws. If the interlineations made on March 16, 1899, did not change the nature of the cause of action which was counted upon by the amended complaint, then it is manifest, we think, that the defendants waived their right to remove the cause by failing to take any action looking to its removal for nearly two years thereafter. And this is so even if it should be conceded that the amended complaint differed from the original complaint in disclosing a federal question. We have made a careful examination of the complaint as it stood both before and after it had been changed by interlineation, and such comparison has satisfied us beyond a reasonable doubt that such interlineations as were made by leave of court on March 16, 1899, were unimportant and effected no change whatever in the cause of action. If the interlined complaint shows a right of action arising under the federal laws, then, beyond all controversy, the amended complaint before it was interlined showed a right of action of the same character; and the same statement may be made with reference to the original complaint of February 25, 1895, which, as the lower court held, did not disclose a federal question, but stated a cause of action at common-law for deceit. Bailey v. Mosher (C. C.) 74, Fed. 15. Realizing, apparently, that the second application for a removal of the cause was made too late, for the reasons already stated, counsel for the defendants have suggested that in as much as the original petition for removal, which was filed on March 29, 1895, remained on file, it operated proprio vigore to oust the jurisdiction of the state court as soon as the amended declaration was filed. This suggestion assumes, of course, that the second complaint differed from the first or original complaint as respects the cause of action stated therein, which assumption in our judgment is erroneous. We are unable to discover any difference in the cause of action stated in the two complaints. But aside from this

view of the case, we are of opinion that the original petition for removal was functus officio when the case was originally removed and remanded, and that it could not have any effect upon a subsequent amended complaint filed in the case, even if the latter did state a different cause of action arising under federal laws."

These authorities, together with the amended and original petitions, the petition to remove the action and the motions for a new trial, all clearly show that this court has no jurisdiction of this action, or the parties thereto, and that the contention of plaintiffs in error concerning the allegations of the original and amended petitions has been held by the law in this case against him, and if plaintiffs in error desired to have a federal right reviewed by this honorable court after the cases were remanded, they should have laid the proper foundation so to do, at the proper time in the proper way.

Second Point.

The state court did not decide a federal question, but expressly held it was not necessary so to do, and rested its decision on the independent ground, of construing the petition, to state a cause of action for fraud and deceit, following Shiras, judge, and Thayer, circuit judge, supra, which decision of the state court is broad enough to maintain the judgment now complained of, nor did the petition of defendants in error nor the answer of plaintiffs in error, nor the motion for a new trial, allege or set up a right, privilege, or immunity, under a federal law or a federal question.

"A suit cannot be one arising under the constitution, or

laws of the United States, until it has in some way been made to appear on the face of the record that some title, right, privilege or immunity upon which the recovery depends, will be defeated by one construction of the constitution, or a law of the United States, or sustained by an opposite construction."

Starin v. New York, 115 U. S. 248.

Germania Insurance Co. v. Wisconsin, 119 U. S. 473.

City of New Orleans v. Benjamin, 153 U .S. 411.

The judicial construction does not depend upon the validity of the claim set up under the constitution or the laws of the United States, but upon the fact, that the claim involves a real and substantial dispute or controversy in the suit.

Nashville and Cy. Ry. Co. v. Taylor, 86 Fed. 168.

St. Paul & M. Ry. Co. v. St. Ry. Co., 15 C. C. A., 167.

St. Joseph & G. Ry. Co. v. Steele, 167 U. S. 659.

A claim which in fact depends upon questions of local or geenral law is not within the jurisdiction, even though a reference to a federal statute is made.

St. Paul & Co. Ry. Co. v. St. Ry. Co., ubi supra.

The existence of a federal question must be shown upon the face of plaintiffs' declaration or bill, in order to give federal jurisdiction, and it cannot be established by a petition for a removal, answer or demurrer.

State of Indiana v. Oil Company, 85 Fed. 876.

Tennessee v. Union Planters Bank, 152 U. S. 454.

Pacific Co. v. Ellert, 64 Fed. 421.

Florida & Co. v. Bell, 87 Fed. 369.

Plaintiffs in error do not set up in their answer a claim, privilege, or immunity, belonging to them under any federal law which must appear by averments so distinct and positive as to place it beyond question, by a statement in legal and logical form, such as required by good pleading, that plaintiffs in error or that defendants in error in their petition intended to rely on the same.

The answer of the plaintiffs in error, in a certain way attempts to set up: First, a federal right in the defendants in error; second, a federal right, or claim of right, privilege, or immunity, in plaintiffs in error, in and to a certain judgment for costs of suit alleged to have been obtained in an action between the same parties pending in the circuit court of the United States for the District of Nebraska, but that said judgment for costs is a bar; third, payment of plaintiffs' claim; fourth, that necessarily from the allegations of fraud and deceit alleged in the petition, plaintiffs in error insist that the old common-law right and remedy for damages for false and fraudulent representations, the basis of the old common-law action for fraud and deceit, was abolished in the several states as to depositors and creditors, by the acts of Congress relating to national banks, and the damages sought to be recovered by plaintiffs, was an asset of the bank, its receiver, its stockholders or the general creditors of the bank. But that said assets belong to the bank, its creditors, its receiver, or its stockholders. Not to plaintiffs in error.

Charles W. Mosher, the president, and Richard C. Outcalt, the cashier, of said bank, also filed a separate answer

but they are not parties to the separate answer of David E. Thompson, nor to the separate and joint answer of Charles E. Yates and Ellis P. Hamer, appearing on pages 18 to 24, of Record No. 230, but it is necessary to go to the two answers last named to see the vast difference between what plaintiffs in error claim now in the assignment of errors in this court, and what they really claimed by their separate answers; by the instructions offered to the trial court to the jury; by any evidence introduced and by the motions for a new trial in the trial court.

These answers are substantially duplicates and set up the same defense. The first defense simply recites certain facts concerning the Capital National Bank, and that defendants were stockholders; that the bank was closed and a receiver appointed; that no forfeiture of the franchise of the banking association has ever been declared by the Comptroller of the Currency for any reason whatever. The third paragraph of the first defense mentions the duties and obligations of the several directors and stockholders of said bank which were such, and only such, as required by the "National Banking Act."

The fourth paragraph of the first defense denies that they signed or attested the reports referred to in the amended petition, or that they made, signed or altered any report, purporting to show the condition of said bank "for the purpose and in the manner alleged in the plaintiffs' said amended petition.'

The fifth paragraph of the first defense alleges:

"That the cause of action set out in plaintiffs amended petition, if any it has, is founded upon alleged facts, which

if true, constitute a violation by this defendant **as a director or stockholder of his duties as such director or stockholder** as laid down and defined in the National Banking laws of the United States above referred to. * * * That if any liability attaches to him as **director or stockholder** of said bank, or any act done, or duty neglected **as set forth in the amended petition,** or otherwise, that **such liability** is determined and controlled by the National Banking act **concerning the management of national banks** and that in determining the liability of this defendant, there is necessarily involved the construction of said banking acts **relating to the duties of directors and stockholders of said national banks.** That a federal question is involved in determining the liability of this defendant by reason of the **alleged mismanagement of said bank** and the **alleged** neglect of duty on the part of this defendant."

We undertake to say that plaintiffs in error did not in and by this allegation specially set up in legal and logical form, and claim a federal right, privilege, or immunity of his own, under the "National Banking Act" or under section 709 of the Rev. Stat. of the United States.

All or nearly all that plaintiffs in error attempted to do by this pleading was to set up **what is alleged and set up in the petition.** In other words, plaintiffs in error did not by clear and concise language and with proper and good pleading set up and claim any right of his own, as now set up in the assignments of error appearing in the printed Record No. 230 at pp. 111 to 113, wherein it is now specially set up that the court erred in deciding that section 5239 of the revised statutes of the United States limits or controls the liability of plaintiffs in error for making, attesting and publishing the reports to the Comptroller of the Currency, whereas nothing of the kind was held, decided or passed upon by the state courts, nor was section 5239 even men-

tioned in the motions for a new trial or the answer.

Assignments numbers 6 and 7 are quite alike except that in No. 7 it is now claimed that the decision in this action by the Supreme court of the state is in violation of section 5239 of the revised statutes. But if you turn to the allegations of the answer and the motions for a new trial, it will be seen that plaintiffs in error do not claim or base any federal right under sections 5239 of the revised statutes, nor did they set up or specially plead such a right as belonging to them or either of them, nor did any one of these plaintiffs in error at the proper time or in a proper way make such claim. And what is true as to section 5239 is also true as to section 5211 of the revised statutes now mentioned in assignment No. 9, and section 5234 and section 5236 of the National Banking Act now mentioned in assignment No. 10, together with section 709 of the revised statutes now mentioned in assignment No. 11. Not one made thereunder in the answer, or in the motion for a new trial, and no right, title, privilege, immunity or demand was specially set up or pleaded by any one of these plaintiffs in error, in or under any one of these laws in the trial court, nor can it be fairly said that a direct or positive claim was made under the "National Banking Act." Plaintiffs in error did not in the state court claim any right arising under any such laws either by pleadings; by their evidence; by their instructions to the jury or in the motion for new trial in the trial court.

What the plaintiffs in error did allege by the separate answer of David E. Thompson and by separate and joint answer of Charles E. Yates and Ellis P. Hamer was that the plaintiffs, now defendants in error; the bank; the cred-

itors of the bank; the directors of the bank; the stockholders of the bank, or using the plural number in said answer, "all banks" mentioned in the "National Banking Act," had a federal right, or must perform said duties, under the "National Banking Act," which gave to them the right of removal out of the state court into the federal court or by inference that they had a right, privilege or immunity, under the "National Banking Act" belonging to them; not to plaintiffs in error, and that is the reason why it is alleged in the third, fourth and fifth paragraphs of the first defense in the answer (Record 230) and make use of the following language:

"That the duties and obligations of the directors and stockholders of said bank were such and only such as were required by the National Banking Act, * * * and that if he (plaintiff in error) made, signed or attested any report showing the conditions of said bank for the **purpose and in the manner alleged in plaintiff's amended petition,** it is founded upon the alleged facts which, if true, constitute a violation by these defendants as a director or stockholder of his duties as such director or stockholder as laid down and defined in the National Banking laws of the United States **for any act done or duty neglected as set forth in said amended petition or otherwise. * *"**

Plaintiffs in error made reference to the "National Banking Act" and the "National Banking laws" in the state court for the further reason appearing in the first paragraph of the motion for a new trial.

"**First, that said cause of action had been duly and legally** removed to the federal court on account of the federal questions involved as shown in plaintiffs' petition; and this court had no jurisdiction or power under the law to proceed further with the trial of said cause."

It is quite clear from these allegations that plaintiffs in error considered a federal question appeared on the face of the petition, not in themselves but in the bank, the creditors or the stockholders, and therefore the action was removable, and that the duties and obligations of the several "directors and stockholders" reference being made to them under this law, and the right they, or the bank, might have had under a federal law, together with the allegations in the answers referring to plaintiffs' petition, that the action was removable because of the allegations set forth in the amended petition, but the allegation is very uncertain and ambiguous whether any federal right the pleader had was specially and clearly set up or claimed or relied upon in either one of the two answers, as a defense in the action.

It is held by this court that:

"It is well settled that in order to give this court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under the United States, that a title or right must be of the plaintiff in error and not of a third person only."

Owings v. Norwood, 5 Cranch 344.

Montgomery v. Hernandes, 12 Wheat 129-132.

Henderson v. Tenn., 10 How. 311.

Hales v. Gaines, 22 How. 144-160.

Long v. Converse, 91 U. S. 105.

Giles v. Little, 134 U. S. 650.

Ludeling v. Chaffee, 143 U. S. 305.

The entire second defense of the answers is concerning a certain judgment claimed to have been obtained in an

action of like title between the same parties in the United States circuit court for the District of Nebraska, wherein a judgment for costs was rendered in the sum of $125.73, and that defendant in error failed and neglected to pay said judgment for costs and that said judgment is a bar to the prosecution of this action. But neither Thompson, Yates or Hamer were even a party to the action of Bailey v. Mosher et al., cited above, and this judgment is not even urged in the brief of plaintiffs in error as against any of deefndants in error, save and except Thomas Bailey. We therefore leave the argument as to the difference btween the cause of action set up in the old petition of Bailey v. Mosher as determined by Caldwell, circuit judge, and the petition in case at bar as determined by Shiras, district judge; Thayer, circuit judge, and the Supreme court of Nebraska.

The third defense is simply an allegation of payment and this court has no jurisdiction over any of the matters alleged in the third defense. The fourth defense (23 Record No. 230) in the answer alleges:

"* * * That if he neglected any duty as such director or stockholder, or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the bank becomes insolvent and gave rise to a cause of action against this defendant sounding in damages, said cause of action existed, if any, in favor of the bank or the receiver of said bank after his appointment, and not in favor of this plaintiff."

So far, then, as to any of the defenses set up in the two answers, not a single word appears in the same complying with section 709 of the revised statutes, specially setting up or making a claim to a federal right, privilege or im-

munity by a plaintiff in error in himself, which this court has jurisdiction to review. There is in the answer some inferences that the Capital National Bank; the receiver of said bank; the directors; the defendants in error or the stockholders had a federal right or claim under the "National Banking Act" or that the cause of action set up in the amended petition under the banking laws of the United States belonged to said bank, or its receiver, but neither said bank or its receiver, or its directors or stockholders being a party to this suit, under the authorities above cited, it has become wholly immaterial as to the allegations concerning any federal right owned or claimed by the defendants in error, the bank, its receiver, its stockholders or its board of directors.

But the fourth defense continues in the allegation that if plaintiffs did deposit their money in said Capital bank as alleged, and the bank then failed and became insolvent, the plaintiffs could not individually recover the said money **from said bank** and said damages when recovered would, under the law, be distributed ratably by said bank, or by the receiver of said bank among the creditors and stockholders of said bank.

This is a clear allegation of a cause of action, or a cause of defense in a third party, to-wit: the bank; its receiver; its creditors or its stockholders. There is no pretense of any right or claim, privilege or immunity, of the plaintiffs in error, under any federal law on behalf of himself in this allegation.

Under section 709, granting jurisdiction to this court of:

"Where any right, title, privilege or immunity is claimed

under the constitution, or any treaty or statute, or commission held, or authority exercised under the United States and the decision is against the title, right, privilege or immunity, specially set up or claimed by either party under such constitution, treaty, statute, commission or authority may be re-examined. * * *"

And this court has held:

"Jurisdiction in such case cannot be inferred argumentatively from averments in the pleadings, but the averments must be positive."

Hamford v. Davies, 163 U. S. 273.

We assert it to be the law of this court, in order to give jurisdiction in this case under section 709, that some right, privilege or immunity of the plaintiffs in error must be specifically pleaded, some federal right or some federal statute, and a distinct and special claim thereunder, in language that is so clear and plain as to show that the plaintiff in error himself, or some one of them, intended to rely upon the same, whereas it is clear and plain from the allegations of the answers that the plaintiffs in error did not make or claim a federal right, privilege or immunity which he insisted upon as his, and under which he claimed and pointed out to the trial court that the federal courts would protect him in such right.

The amended petition appearing on pages 7 to 12 of the printed record need hardly be copied by us at large, but we assert that not one sentence, line or paragraph thereof appears in the whole petition setting up a federal right blonging to the defendants in error whereby the defendants in error were made to rely or claim under or by virtue of

a federal law, and about as strong a part of the petition to aid plaintiffs in error is:

"Plaintiff states that by reason of facts as above set forth and the false and fraudulent statements, advertisements and representations of the defendants the plaintiff has been damaged in the sum of Twenty-Five Thousand ($25,000) Dollars; wherefore plaintiff prays judgment against the defendants and each of them for the sum of Twenty-Five Thousand ($25,000) Dollars, his damages with interest thereon from January 21st, 1893, at 7 per cent and costs of suit."

Perhaps the first, second, third and fourth paragraphs of the motion for a new trial will more clearly set forth the federal right, privilege or immunity claimed by plaintiffs in error than any other concise statement in the record. The same appear on pages 49 and 50 of Record No. 230, and are as follows:

"I. That said cause of action had been duly and legally removed to the federal court on account of the federal questions involved, as shown in the plaintiff's petition; and this court had no jurisdiction or power under the law to proceed with the trial of said cause.

"2. The court erred in the admission of any testimony over the objection of this defendant, for the reason that under the cause of action set forth in the plaintiff's petition being one to recover damages on account of the negligence, misconduct and mismanagement of the bank on the part of this deefndant the plaintiff is not, as a matter of law, entitled to recover.

"3. The damages alleged in the plaintiff's petition, if any existed, on account of the charges made in said petition could only be recovered by the bank or by the receiver, and ratably distributed among all the creditors and stockholders of said bank, and could not be recovered by the plaintiff for itself individually.

"4. The court erred in taking jurisdiction of said case

and the hearing of the proof under the allegations of the plaintiff's petition over the objection of this defendant, for the reason that the duties and liabilities of this defendant as a director of the Capital National Bank are governed and controlled by the National Banking Act, under which said bank was organized, and for which this defendant was acting in the capacity of a director; and the damages growing out of the mismanagement, negligence or fraud of this defendant as charged in said petition, if the same existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the National Banking Act and the liabilities of said defendant under said act as a director of said bank."

The above is perhaps as strong a statement as appears in the records and is substantially the only attempt in the trial court to raise a federal right on behalf of plaintiffs in error.

A question of assessment of a national bank is not a federal question.

Williams v. Weaver, 100 U. S. 547.

And so in the case at bar the cause of action set up in the original and in the amended petitions is as old as the common-law itself, the right to a cause of action for fraud and deceit existed long before a federal question, or even our federal government, came into existence. The state court, Shiras, district judge and Thayer, circuit judge, all held that the cause of action stated in the original petition and in the amended petition is one for fraud and deceit, and we feel confident that this court will hesitate long before it will hold that all the defendants in error were endeavoring to accomplish by the cause of action was to establish or collect an asset which belonged and should go

to the receiver of the bank for the benefit of general creditors when they had suffered so severely personally in damages, which asset would have to be equally divided pro rata among hundreds of creditors of the defunct bank, instead, as stated on the face of the petition, to be a claim for individual damages caused by the false and fraudulent representations of the plaintiffs in error.

In Chappell v. Waterworth, 115 U. S. p. 102, this court holds that under the acts of March 3, 1887, and August 13, 1888, a case not dependent on the citizenship of the parties

"Cannot be removed from a state court into the circuit courts of the United States, as one arising under the constitution, laws or treaties of the United States, unless that appeared by the plaintiff's statement of his own claim, and if it does not so appear, the want cannot be supplied by any statement in the petition of removal or in the subsequent pleadings."

In Tennessee v. Union & Planters Bank, 152 U. S. 454, this court in an exhaustive opinion by Mr. Justice Gray held, that the jurisdiction of the circuit courts, either original or upon removal, "must appear at the outset from the declaration or bill of the party suing that the suit is of that character."

The petition in the case of Oregon Short Line Ry. v. Kottowe, 162 U. S. 490, alleged as much of a federal question, perhaps more so, than does the petition at bar, but the court held that under Tennessee v. Union & Planters Bank and Chappell v. Waterworth that the cause of action stated in the petition was really one of negligence, while in the case at bar it is one of negligence and of fraud and deceit.

We venture the assertion that not one positive or special averment, allegation or paragraph can be quoted from the petition of defendants in error, or from the separate answer of plaintiffs in error, wherein or whereby it is alleged, set up, claimed or relied upon a federal law, or a federal right of any kind by either one of the parties hereto. It so happened that the defendants were pretending to and were carrying on a national bank created under the laws of the United States and some of the defendants were directors, some managers and some officers of the bank, but all of them induced defendants in error to believe that the bank was a safe and sound institution wherein to place his money, and the reports of the condition of the bank to the Comptroller of the Currency showing the good standing of the bank, were published in the local newspapers, seen and read by plaintiffs who relied upon and believed said published statements and verbal representations to be true, whereas said bank was insolvent from the very day it was organized as a national bank and until its doors were closed in bankruptcy, and it is the hope of plaintiffs in error that these mere references to the "National Banking Act" will now be taken as a positive allegation and claim of a federal right of plaintiffs in error.

In charging fraud in pleadings under the state law, the petition must state facts, not conclusions, hence it is from inferences, conclusions and forced construction to be placed upon the petition, as well as the separate answer, that plaintiff in error hopes to have the court meet with his views.

This court is bound by the findings of the trial court which were sustained by the Supreme court of the state,

and they are conclusive and binding upon this court. We quote from Egard v. Hart, 165 U. S. on p. 191 from the opinion in the case of Mr. Justice White:

"It is clear if these questions of fact are adequate to determine the controversy between the parties and broad enough to maintain the judgment, independent of any federal question, then we are without jurisdicition although the state court may have also decided such a question. Eustus v. Bollies, 150 U. S. 361. N. Y. Railroad v. Woodruff, 153 U. S. 689. Hammond v. L. Ins. Co., 156 U. S. 633."

The case at bar is largely like the case of Zadig v. Baldwin, 166 U. S. 485, and the same order should be made herein, as in that case.

But the words of the statute demands that plaintiff in his petition **"must specifically plead some federal right in language so that it is plain and clear that plaintiff himself intended to rely on the federal law.'**

No one, so it seems to us, can successfully point out that plaintiffs in error intended by their answer or that defendants in error intended to set up by the petition a right, privilege or immunity under a federal law. The petition rings with fraud and deceit, with false representations, with reliances by defendants in error upon such fraudulent statements and that plaintiffs believed them to be true and a claim that because of such fraud he was damaged in the amount named in the prayer to the petition. While the answer alleges the right of defendant in error, the board of directors; the stockholders; the bank or the receiver of the bank and of the cause of action set up in the petition of "banks' generally, named in the "National Banking Act." Not a national statute, law or constitution, section or para-

graph thereof is "specially set up" or "specially pleaded" or relied upon or a claim made thereunder by the defendants or plaintiffs in error, either in the petition or the answer, and it is only by a forced construction or by a wild inference that plaintiffs in error can see some federal right that they think defendants in error; the bank; the receiver or the bank; the stockholders or the "banks" named in the "National Banking laws" intended to or should be compelled to rely upon.

In Oxley Stave Co. v. Butler, 166 U. S. 648, the syllabus in that case is as follows:

"This court cannot review the final judgment of the highest court of the state even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was "specially set up or claimed" in the state court as belonging to such party under the constitution or some treaty, statute, commission or authority of the United States, revised statutes 709.

"The words 'specially set up or claimed' in that section imply if a party in a suit in a state court intends to invoke for the protection of his rights the constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare, and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. **This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference."**

In Levy v. Superior Court of San Francisco, 167 U. S. p. 175.

The syllabus to the case is as follows:

"Oxley Stave Co. v. Butler County, 166 U. S. 648, fol-

lowed to the point that "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from inference but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right.

"A definite issue in respect to the possession of the federal right must appear and be distinctly deducible from the record."

Muse v. Arlington Company, 168 U. S. 430.

The writ of error was dismissed in this case on quite similar grounds as stated in last authority.

In Mutual Life Ins. Co. v. Kirdoff, 169 U. S. 103, the last part of the syllabus is as follows:

"Oxley Stave Co. v. Butler Co., 166 U. S. 648, cited, quoted from and approved to the point that the words 'specially set up or claimed,' in Rev. Stat. 709, imply that if a party in a suit in a state court intends to invoke for the protection of his rights, the constitution of the United States, he must so declare, and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court."

In the case of Kipley v. Illinois, 170 U. S. p. 182, Mr. Justice Harlan held as follows:

"When the jurisdiction of this court is invoked for protection against the final judgment of the highest court of a state of some title, right, privilege or immunity secured by the constitution or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege or immunity was specially 'set up or claimed' under such constitution or laws, as the jurisdiction of this court cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a federal right."

Chief Justice Fuller in the Western Union Telegraph Company v. Ann Arbor Railroad Company, 178 U. S. p 239, held as follows:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, upon the determination of which the result depends, it is not a suit under the constitution and laws; and it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends upon the construction of the constitution, or some law or treaty of the United States, before the jurisdicition can be maintained on this ground."

In the case at bar the plaintiffs in error as well as defendants in error did not specially plead, set up or claim under any right at all under any special law or statute of the United States, neither was there an issue raised by and between any allegation in the petition and the answer of plaintiffs in error, or by the reply, as to any federal right, privilege or immunity, or claim of right by either of the parties to this action.

The only federal right that can be deduced by inference in these premises is the reiterated claim of plaintiff in error that defendant in error does of necessity make such claim, by the petition, but from the beginning of this action up to the present time defendants in error have made a clear, positive and distinct claim and allegation of fraud and deceit; has successfully proved the same; has recovered a judgment for the same; has succeeded in obtaining the judgment of Shiras, district judge, and Thayer, circuit

judge, together with both the trial court and the Supreme court of the state, holding plaintiffs in error liable for fraud, and nothing but fraud, under the petition and the general laws of the state of Nebraska.

Again nothing in the record shows more clearly that the damages sought to be recovered by the petition are not the assets referred to or the cause of action arising under any one of the several sections of the "National Banking Act" than does the evidence in this case, and to illustrate this more clearly take the evidence of H. T. Jones, the cashier and managing officer of the Jones National Bank, who, on p. 191 of the bill of exceptions, says:

"Q. Was the Capital National Bank of Lincoln your correspondent, as it is termed in banking? A. Yes, sir. Q. Do you know the amount of money the Jones National Bank had on deposit with the Capital National Bank and which the Capital National Bank was owing the Jones National Bank on the 21st day of January, 1893? A. Our books showed $12,529.23, but the facts were, that they were owing us $17,529.23 on account of a $5,000 remittance I had ordered them to make, and sent them the money, and they reported to me that they had, but they never did. Q. What was the remittance you ordered them to make? A. $5,000 to the Chemical National Bank of New York City. Q. And did the Capital National Bank report to you that that amount had been remitted to the Chemical National Bank for the Jones National Bank? A. It did on the 16th day of January, 1893. Q. I hand you exhibit No. 1054 and will ask you from whom that was received and where you received it? A. It was received in the regular course of business, by mail, from

the Capital National Bank, a postal card in the handwriting of Colonel Hale. Q. What does the writing on this postal card indicate, what does it mean? A. That they have remitted for our account, New York, $5,000. Q. Is that the item to which you referred in your previous answers, the one which you had ordered transferred to the Chemical National and which the Capital National had not remitted? A. It is. Q. And does that item account for the difference betwe en the amount as shown on your books, which they owed you, and the amount which they actually owed you? A. It does. Q. At the time you ordered this money forwarded or transferred by the Capital National Bank to the Chemical National Bank, did you give the Capital National Bank of Lincoln credit on your books for the $5,000? A. Yes, sir.

Mr. Thomas: We offer in evidence exhibit No. 1054. . . . No objections.

Exhibit No. 1054 received and read in evidence as follows:

Addressed: Jones National Bank, Seward, Nebraska.

(Lincoln, Nebr., Jan. 17, 1:30 a. m., '93)

C. W. Mosher, President; H. J. Walsh, Vice-President;
R. C. Outcalt, Cashier.

CAPITAL NATIONAL BANK.

Lincoln, Nebraska, 1-16, 1893.

Yours of.....Received with enclosures as stated.

Credited.....Entered for collection.....We remit.

1009 New York $5,000
Chicago
Ex. 1054, OPH. Omaha
Currency
Silver

This bank in receiving collections elsewhere than in Lin-

coln acts only as your agent and assumes no responsibility beyond that of due diligence on its part.

Yours respectfully,

R. C. OUTCALT, Cashier.

The court will please understand that this postal card, exhibit No. 1054, was simply a false representation made by the Capital Bank in order to obtain the $5,000 from the Jones Bank. The Capital Bank did not remit said $5,000 to (The Chemical National Bank) New York, as falsely stated "we remit $5,000, New York." This money was obtained by the Capital Bank after years of business establishing a splendid credit with the Jones Bank, but the money was obtained in no real different manner than had a burglar entered the Jones Bank with jimmy and dynamite. The receiver of the Capital Bank, or the Capital Bank, as alleged in the answer in this case, would have no cause of action for this $5,000, to be recovered by the Capital Bank under the "National Banking Act" as an asset to be distributed pro rata among all creditors of the Capital Bank. If the Jones Bank can only have its pro rata share distributed to it for this 5,000 it would only be adding insult to injury and the bare statement of facts as shown by this evidence clearly shows that the cause of action set up in the petition is for fraud and deceit and is not, cannot be, for assets wrongfully diverted from and belonging to said Capital Bank. This item of $5,000 never was nor could it ever become an asset of the Capital Bank.

The date of this postal card is January 16th, 1893. The bank is said to have failed on January 21st, but the 21st was Monday when it failed to open its doors,, so that in fact it really failed on Saturday, January 19th. The card is dated

the 16th. It was stamped by and reached the U. S. post-office on the 17th at Lincoln, Nebr., at 1:30 a. m. So that it was impossible for it to reach Seward until late on the 17th or early on the 18th, which was Friday, the day before the bank in fact failed. In other words, the Jones Bank was swindled out of $5,000 by means of this P. O. card and the money so obtained ran this bank Saturday, otherwise it would have closed its doors on Friday the 18th. Can it be possible that such a claim for damages belongs to the bank or the receiver or the general creditors or the stockholders of the Capital Bank, and that the National Banking Act has destroyed and taken away the right of the Jones Bank to recover such a damage in an action for fraud and deceit? The Capital Bank was not damaged, it simply received $5,000 by the fraud of plaintiffs in error.

But let us go to the evidence of Thomas Bailey for one more illustration of whether the damages named in the petition belong to the Capital Bank, its receiver or the general creditors of the bank.

On p. 173, Bill Ex., Mr. Bailey says:

"Q. Tell what your transaction was? A. In the first place I went to the bank to see what interest they were paying before I took this out. I received notice from the First National Bank that they wouldn't only give me 5 per cent interest, and I thought this Capital National Bank was as good as the First, and they offered me 6, and the consequence was I just signed the certificate of deposit over to them and they gave me their certificate for it. Q. Have you any memorandum by which you can refresh your memory? A. October 11th, 1892. Q. Well, how much was that? A. Ten thousand dollars I deposited there that

day. Q. And when did you have any other transaction with the bank with reference to the matters involved in this suit, if any? A. Well, I deposited some more in December 28th, 1892. Q. How much? A. I think it was $2,000. I don't remember the exact amount. Q. Now how many transactions did you have with the bank? A. I think that about all that I can remember. I drew five hundred dollars out January 19th, 1893. Q. Well, now you may state how you came to do business with the Capital National Bank instead of the First National Bank. A. The reason was the First National only wanted to give me 5 per cent on my money and I went down to the Capital National Bank and they offered me 6. Q. How did you come to go to the Capital National Bank? A. I went on purpose to see what they would pay on the money and I thought it was just as good as the First National. Q. What information did you have as to the condition of the Capital National Bank? A. As soon as I went in they handed me a card and the directors and stockholders of the bank were on that card and I took the papers several years previous. Q. What papers? A. The Semi-Weekly Journal, I believe, and the Call. Q. State what you saw in them if anything? A. I supposed it was as good as I could do. Q. What did you see? A. I saw that the bank was in pretty good circumstances, as I supposed the way the amount of assets read in the published statements. Q. You say they gave you a card of the bank on which the officers' names and directors appeared? A. Yes as soon as I came into the bank and told them I had some money, I had in the First National Bank, and they offered me 6 per cent and I thought they were just as good as the other and I

thought I would like it. Q. State when it was with reference to time? A. I suppose ever since the bank started, for I read the papers every day and took particular notice. I had some money to loan out and I took a little notice where I thought was the best place to put it. Q. And what reliance did you make, if any, upon these statements? A. Well that was all the reliance I had was what I could get information in the papers in regard to the standing of the bank. Q. State what information, if any, you had other than what was disclosed in the statements that were published. A. That is all the information I had. Then I knew some of the officers and I thought they were good business men. Q. You knew some of the directors? A. Yes, sir. Q. What ones? A. I knowed Walsh. Q. And did you know any of the others? A. I knowed two or three of them personally. I knowed Mr. Mosher and Outcalt and I knowed Mr. Stuart well. Q. And did you know who were the directors of the bank as shown by the advertisements and card? A. I knowed the balance by reputation. Q. Well, who were they? A. They had Stuart, Holmes, Mr. Thompson, Hamer, Phillips, Yates and Mr. Mosher and Outcalt was cashier. I have known him ever since he has been in the state. I did business with him when Sweet & Brock were running a business there. Q. You may state, Mr. Bailey, if you know anything about the condition of the bank except as was disclosed by the published statements?. You may state where you got your information as to the condition of the bank A. I got it out of the published statements. Q. And from any other source? A. No, sir, I had no other source to get it from. Q. You may state, Mr. Bailey, whether or not you would have deposited

your money and transacted your business there at this bank except upon the statements that you had seen and read. State what inducements were made and all of them that were made in order to induce you to transact your business with this bank? A. The inducement was that they would give me 1 per cent more than the First National Bank, and I thought it was just as good as where I had it, and I was getting more interest on my money. Q. Was that all that induced you to transact your business there, or was there any statements made? A. All the statements that was made I read in the papers. Q. Now, which did you rely upon, the—You may state what effect those published statements had upon your transacting business with the Capital National Bank, if any? A. Why, that is all the effect; all I had to go by was the published statement, supposing it to be true and correct. Q. Did you believe it to be true? A. I believed it to be true or I would not have put my money there. I would have kept it where it was. Q. How did you know now the reputation of these directors? A. Well, I had heard they was good men; I knowed some of them to be good business men. Q. Men of wealth and business sagacity? A. Men of wealth, yes sir.'

Kindly remember that this bank failed and closed its doors in fact on January 19th. On October 11th, just 100 days prior to the inducements offered to him as above shown to take his $10,000 out of the First National Bank and put the same in the Capital Bank. On December 28, just twenty two days prior to the collapse, he placed $2,000 more in this bank, believing it to be a safe place to put his money. We have shown by our briefs here on file that the Capital Bank was never solvent. That from the very day

it was organized as the Capital National Bank to the 19th day of January, A. D. 1893, it was a bankrupt. This occurred on October 11th, just 100 days prior to its closing its doors as a business house, a period from May, 1884 (Bill p. 61) to January 19th, 1893, every hour of which the managing officers of this bank had actual knowledge and every director and officer either well knew or ought to have known that said bank on October 11th, 1902, should not entrap Mr. Bailey into withdrawing his money from the First National Bank and place it where they knew it could never be repaid, did not plaintiffs in error thereby create the cause of action set forth in the amended petition, or did they create a cause of action in the Capital Bank, under federal law, or is it a cause of action personal to Mr. Bailey?

Can it be possible that it is law, justice or right that Mr. Bailey has by virtue of the "National Banking Act" lost his right to a personal action in a state court to recover this money, for so palpable fraud as this? That the old action at common-law for fraud and deceit is abolished in state courts; and the "National Banking Act" is an inhibition and prohibition on the very jurisdiction of state courts in actions of this kind?

Section 5239 (Rev. Stat. U. S.) is not alleged or set up by Thompson or by Yates and Hamer in their separate answers. In general terms it might be included in the right of the third parties alleged under the "Banking laws of the United States" and "The National Banking Act," and the "National Banking laws." They did not mention it in their motion for a new trial in the trial court (p. 43-49-50-51 and 52 Tr.), neither did they

claim any right under section 5239 now so earnestly set up in the brief of Mr. Thompson, nor did they mention it in their instructions to the jury, or in a petition in error in the Supreme court of the state. What they did claim was that defendants in error had or stated such a right in defendant error by the allegations of the petition.

In the case of King v. McLean, Asylum, 12 C. C. A. p. 139, the court held:

"A petition for habeas corpus which merely alleged that the petitioner is restrained in violation of the constitution and laws of the United States and is illegally imprisoned without due process of law, but does not set out in detail anything touched by the federal laws or constitution, does not state facts giving the circuit court jurisdiction."

Whittmore v. Bank, 134 U. S. 527; 10 Sup. Ct. 592, was an action commenced in the United States court for the District of NewHampshire by a stockholder for himself and such other as might join, against the directors, cashier and ex-director of a national bank to compel them to pay money lost to the bank by reason of their illegal conduct, charging them with doing acts **"in doing which the directors and officers violated their duties and obligations to the bank's stockholders, and their acts were in violation of the charter of the bank and the laws of the United States"** and it was claimed by counsel in that action, same as the one at bar, that the circuit court had jurisdiction under sections 5209 and 5239 of the revised statutes.

This court dismissed the bill for want of jurisdiction in the circuit court.

The syllabus is as follows:

"Under act of Congress July 12, 1882, providing that the

jurisdiction for suits by or against any association established under any law providing for national banking associations, except suits between them and the United States, shall be the same as the jurisdiction for suits by or against banks not organized under any law of the United States, the circuit court of the United States has no jurisdiction of a suit by a stockholder of a national bank against the bank and its officers and directors, all of whom are residents of the same state, to compel collection of a note due the bank, and payment to the bank by the directors of sums lost by reason of their illegal conduct.

"Nor is such jurisdiction conferred by Rev. Stat. of United States, 5209, prescribing punishment for embezzlement or wilfull misapplication of the funds or credits of a national banking association by its officers or directors; nor by 5239, providing for a suit by the Comptroller of the Currency to forfeit the franchises of national banks for the intentional violation by their directors of the law relating to national banks."

Neither did plaintiffs in error mention Sec. 5239 of the revised statutes of the United States in their instructions offered to the trial court, nor did they lay a proper foundation at the proper time and place in this action for any such right now so earnestly set up in the brief filed herein signed by Mr. Deweese and Mr. Bishop.

The ninth instruction printed on p. 5 of said brief was not offered by Mr. Thompson (p. 30 Record No. 230), but by defendants in error, and by Mr. Thompson duly excepted to. Certainly they cannot in this manner raise a federal question or build up a right or immunity to have this court review the same in this court. He must offer an instruction of his own and the court must refuse him some federal right mentioned therein. That part of the separate answer of Mr. Thompson, printed on pp.5 and 6 of his brief, does not set up, nor did Mr. Thompson at the trial claim a right

under section 5239 of Rev. Stat. U. S. The separate answer of Thompson simply alleges the names of the officers of the Capital Bank; that it was closed by the Comptroller; that no forfeiture of the franchise of the Bank has ever been declared; that the duties and obligations of the directors and stockholders of the bank were such and only such as required by the "National Banking Act," and a denial that he signed the reports **in manner as alleged in the amended petition.** * That the cause of action set out in the amended petition, if any, is founded on the alleged facts which, if true, constitute a violation of this defendant as a director or stockholder of his duties as laid down and defined in **the "National Banking Laws of the United States,"** to-wit:

"Concerning the government and management of National Banks. And this defendant alleges that if any liability attaches to him as a director or stockholder of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the National Banking Act concerning the management of National Banks; and that in determining the liability of this defendant, there is necessarily involved the construction of said National Banking Act relating to the **duties of directors and stockholders of National Banks."**

But this is not claiming a federal right, privilege or immunity in Thompson. It is claiming one, if any, in the directors or stockholders of the several banks of the United States, or of its receiver, or in the defendants in error. It is not, was not a personal claim by Thompson of such a claim to the trial court. The trial court had no notice of any such claim on behalf of Mr. Thompson. At that time

he did not make the claims, or rely thereon, he now makes in his assignment of errors in his brief on pp. 14 to 16. The brief does not comply with the rules of this court and plainly refer to the record where he made such claim in the state courts and especially in the trial court. Take assignment No. 11 (p. 112, Record 230) as an illustration of the manner Thompson even in this court makes his assignment of error.

"* * * And the evidence adduced pertaining to the National Banking law by which and under which the acts and things complained of were done in violation of section 709 of the revised statutes of the United States."

We venture the assertion that Mr. Thompson, nor any of the plaintiffs in error, did not in this whole record assert or make claim to a single federal right, privilege or immunity as belonging to him to which he can now refer the court, that involves a right claimed by himself under section 709 of the revised statutes of the United States, nor did he by clear and direct claim specially assert such federal right under the "National Banking Act" unless the court will now hold that a general reference to the whole of the "National Banking Laws" is sufficient, and unless the court will hold that Mr. Thompson can set up a right in some third party and in some manner draw from the said third party's right such a right to himself.

But the assignments of error in the case at bar only relate to errors of the Supreme court of Nebraska, not to errors relating to some federal right properly set up or claimed in the trial court. We deem this very important, for in Miller v. Texas, 153 U. S. 538, Mr. Justice Brown said:

"And if the Fourteenth amendment limited the power of the states as to such rights as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court. In Spies v. Illinois, 123 U S. 131, 181, objection was made that a certain letter was obtained from the deefndant by an unlawful seizure and the constitutional immunity was set up in the Supreme court of Illinois as well as in this court, but it was not made on the trial in the court of original jurisdiction. It was held, both by the Supreme court of Illinois and by this court, that the defense should have proven that the letter was unlawfully seized by the police and should then have opposed its admission upon the ground that it was obtained by such unlawful seizure. Said the chief justice: 'As the Supreme court of the state was reviewing the decision of the trial court it must appear that the claim was made in that court, because the Supreme court was only authorized to review the judgment for errors committed there and we can do no more. * * * If the right was not set up or claimed in the proper court below the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned.' So in Texas Pacific Railway v. Southern Pacific Co., 137 U. S. 48, it was held directly that a privilege or immunity under the constitution of the United States cannot be set up here under revised statutes (sec. 709) when suggested for the first time in a petition for rehearing after judgment. See also Caldwell v. Texas, 137 U. S. 692, 698."

Section 709 is not even mentioned in the answer, nor in any one of the numerous instructions offered by the defendant in error, or those offered by the court upon its own motion (27 to 36, record No. 230) nor in the instructions offered by Thompson (37 to 44 record No. 230) Section 5136 of the National Banking act is mentioned on p. 38, Record No. 230, which section relates principally to the creating of National Banks; **and this is the only particular reference made by Thompson or any other plaintiff in error** in the instructions to the jury, so that in all instructions

offered by all defendants not one of them specially claimed, set up, or then intended to rely upon a federal right, or bring his case to this court for final adjudication of such a right. Again it should be remembered that separate answers were filed by each defendant. No joint answer of a plaintiff in error, now in this court, was filed save and except Yates and Hamer (21-24, Record No. 230). Each defendant, now plaintiffs in error, stood squarely on his personal and individual right, and yet only in a few instances, and in no instance did any one defendant (37 to 44, Record No. 230) request the trial court to instruct the jury as to his separate federal right, privilege or immunity, under his answer, and not a single defendant requested a separate instruction setting up or claiming a federal right under any federal statute or any federal law, not even the "National Banking Act," and we here assert in the very language of many opinions in this court that:

"* * * It must appear that the claim was made in the court of original jurisdiction, because the Supreme court was only authorized to review the judgment for errors committed there, and we can do no more, and if the right was not set up or claimed **in the proper court below**, the judgment of the highest court of the state in the action is conclusive so far as the right to review here is concerned."

It is the law of Nebraska, well settled by a long line of decisions that the Supreme court can only review the errors alleged in the motion for a new trial and if no motion for a new trial is made within three days of the verdict all errors are waived. And it should be remembered that the only jurisdiction the Supreme court of Nebraska had in this action was to review the errors alleged in the motion for

a new trial and in turn alleged in a petition in error fifiled in the Supreme court.

Sec. 314, Code Civil Procedure Nebraska.

Sec. 315, Code Civil Procedure Nebraska.

McDonald v. McAllister, 32 Nebr. 514.

Nebraska Nat'l Bank v. Pennock, 59 Nebr. 61.

Sec. 584,Code Civil Procedure Nebraska.

Courtnay v. Price, 12 Nebr. 182.

R. V. R. R. Co. v. Mayes, 13 Nebr. 491.

Singer v. Doggett, 16 Nebr. 609.

Dunham v. Courtney, 24 Nebr. 629.

Cunningham v. Tonnemaker, 13 Nebr. 462.

Weir v. B. & M. R. R. Co., 19 Nebr. 215.

Moore v. McCallum, 43 Nebr. 617.

The mere reference to a federal right claimed by defendants in the first paragraph of the motion for a neew trial (p. 49, Record No. 230) which only relates to the rremoval of the cause to the federal court, which alleged eerror, if any there was, plaintiff in error now waives, and ddoes not urge said error to this court.

The third error alleged in the motion (p. 50, Reccord No. 230) that if any damage existed as alleged in the petition "could only be recovered by the bank or by the rreceiver, and ratably distributed among all the creditors anad stockholders of said bank and could not be recovered by plaintiff for itself individually," is not material here for wwe have shown that this is no more or less than setting up aa federal right, in either one of four parties named, entirelyy outside

of this action, namely: First, the bank; second, the receiver of the bank; third, the stockholders; fourth, the creditors of the bank, and such federal right if one really existed in favor of said four parties, can give this court no jurisdiction in favor of plaintiffs in error.

The only remaining error alleged in said motion for a new trial that makes any reference to a federal law, is the fourth paragraph thereof:

"4th. The court erred in taking jurisdiction of said case and the hearing of the proof under the allegations of the plaintiff's petition over the objection of this defendant for the reason that the duties and liabilities of this defendant as a director of the Capital National Bank are governed and controlled by the National Banking Act, under which said bank was organized and for which this defendant was acting in the capacity of a director, and the damages growing out of the mismanagement, negligence or fraud of this defendant, as charged in said petition, if the same existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the National Banking Act and the liabilities of said defendant under said act as a director of said bank."

This objection is very general in its scope and gives the triel court no notice of what the specific error alleged is, and would require the trial court to stop proceedings in his court and take the time to examine the whole "National Banking Act" and every law that the Congress of another nation has passed relative to the negligence or fraud and the liabilities of directors of National Banks. This is too general even under the state law.

But defendants in the motion urged that these damages would not accrue to plaintiffs, but to one or all of the four parties just named. That is the cause of action, if any exists, in favor of said four parties, or one of them. Therefore, plaintiff had no cause of action, and because one of

these four parties had the right to such damages under the federal law, and such federal right existed in them, and therefore this court now has jurisdiction to so determine. Not that any right can be granted defendants in the motion. Only a right can be determined that belongs to one of these four parties and in this manner this court can acquire jurisdiction. But the last few words do say "the liability of defendant under said act as director of said bank." But such a closing to a whole paragraph in a motion for a new trial, referring in the most general terms both to his "liability" and to a whole "National Banking Act," not whereby or wherein, or in what manner the liability so generally expressed was controlled, when all of the damages, as alleged in the motion for a new trial must go and belonged to one of said four parties, shows clearly that this part of the motion for a new trial is clearly insufficient.

The four paragraphs, first, second, third and fourth, are the only ones in the whole motion for a new trial that make a reference to a federal right, privilege or immunity in either one of the plaintiffs in error, and it is clear that a federal right belonging to any one of them, save and except the claim of removal of the action to the circuit court, were not properly, clearly and specifically raised at the proper time and in the proper way.

But this is not all. The case of Schuyler National Bank v. Bollong, 150 U. S. 85, is quite in point. Bolling brought a suit in a state court of Nebraska against the bank squarely under the statutes of the United States and squarely under a particular section of the "National Banking Act.' The bank, by motion, denied the jurisdiction to try the case and alleged "that exclusive jurisdicition is

by the laws of the United States, to-wit: section 711 of the revised statutes of the United States, vested in the courts of the United States to try and determine the above entitled action."

The whole proceedings in said action at large appears at pp. 85, 86 and 87, and the bank in that case made precisely the same attempt and allegations of record that plaintiffs in error have in the case at bar, but in the opinion it is among other things said:

"But by the requirements to the exercise of our jurisdiction of section 709 of the revised statutes, the title, right, privilege, or immunity thus relied on must be specially set up or claimed in the state court at the proper time and in the proper way. The decision must be against the title, right, privilege, or immunity so set up or claimed. Spies v. Illinois, 123 U. S. 131; Brooks v. Missouri, 124 U. S. 394; Chappell v. Bradshaw, 128 U. S. 132; Texas & Pacific Railway v. Southern Pacific Co., 137 U. S. 48. Yet it is urged that the bank had contended at every stage of the litigation **that the trial court had no power to proceed to judgment against it under sections 5197 and 5198, because of the want of averment in the petition of facts essential to give such jurisdiction, and hence that the bank must be held to have specially set up or claimed the title, right, privilege, or immunity under said sections to be exempt from liability to the plaintiff below for any matter or thing alleged in his complaint.** But we are unable to accede to this view. The case was necessarily tried in accordance with the procedure and practice prescribed by the Code of Civil Procedure of Nebraska. That provided a form of action to be called a civil action, and to be commenced by the filing of a petition and the issue of summons thereon; what the petition must contain; that the pleadings should be liberally construed; that redundant matter might be stricken out and the allegations of a pleading required to be made definite and certain by amendment when necessary; that neither presumptions of law nor matters of which judicial notice is taken need be stated in the pleading; that amendments

in furtherance of justice might be made before or after judgment; that the court should disregard errors or defects in the pleadings or proceedings not affecting the substantial rights of the adverse party, and that by reason of such error or defect no judgment should be reversed or affected; for the assignment of grounds for a new trial, including that the verdict, report, or decision was not sustained by sufficient evidence, or was contrary to law, and for error of law occurring at the trial and excepted to. Par. 2, 62; 92; 121; 125; 136; 144; 145; 314; Comp. Stat. Neb. 1887, pp. 741, 748, 753, 756, 758, 759, 779.

"The questions raised upon the pleadings were disposed of by the Supreme court in accordance with these provisions and the jurisprudence of the state in that regard, and there is nothing whatever to indicate that in passing upon the technical sufficiency of the complaint its attention was invited to the proposition that by its judgment thereon it might be depriving the defendant below of some title, right, privilege, or immunity arising in virtue of the sections under which the liability accrued."

In Eustise v. Bolles, 150 U. S. 362, this court says:

"To give this court jurisdiction of a writ of error to a state court it must appear affirmatively not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the federal laws or constittuion, or that the judgment as rendered could not have been given without deciding it.

"Where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment.

"When this court, in a case brought here by writ of error to a state court, finds it unnecessary to decide any federal question, its logical course is to dismiss the writ of error."

See also Baldwin v. Kansas, 129 U. S. 52.

Brown v. Mass., 144 U. S. 573-580.

And in Chappell v. Bradshaw, 128 U. S. 134, the court says:

"As the Supreme court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme court was only authorized to review the judgment for errors committed there, and we can do no more" Tested by this well settled rule it is apparent that this writ of error cannot be maintained, as it is conceded that the plaintiff in error did not set up or claim in the trial court the limitation, the benefit of which he now insists should have been accorded him.

In Brooks v. Missouri, 124 U. S. 394, 400, all through the opinion it is held, that in order to give this court jurisdiction the plaintiffs in error must have laid a proper foundation "at the proper time and in the proper way" and as the Supreme court of Nebraska was reviewing the decision of the trial court, it must appear that the right, title, privilege or immunity was made in the trial court. On p. 399 the general objection was made that a statute of the state was in "violation of * * * the constitution of the United States, nor shall any state deprive any person of life, liberty or property without due process of law nor deny any person within its jurisdiction the equal protection of the laws," but the state court held the statute valid and on p. 400 this court in the opinion says:

"It thus appears that, while upholding the statute, the court also put its decision on another ground which was equally conclusive against the defendant, to-wit, that even if the trial court could, in its discretion, allow the additional reason for a new trial to be presented after the expiration of the four days, there had been no such abuse of that dis-

cretion in this case as would justify a reversal of the judgment on that account. That part of the decision is certainly not repugnant to any provision of the constitution or laws of the United States, and it is of itself conclusive. It was fairly presented and necessarily involved in the case. It disposed of the supposed constitutional question presented in the argument without a direct decision, upon a ground which cannot be reviewed by us, and which was not evasive merely, but real. Chouteau v. Gibson, 111 U. S. 200; Adams County v. Burlington & Missouri Railroad, 112 U. S. 123, 125, 127; Chapman v. Goodnow, 123 U. S. 540, 548. Such being the case, the decision of the alleged federal question was not necessary to the judgment rendered and consequently is not sufficient to give us jurisdiction. Murdock v. Memphis, 20 Wall. 590, 636."

In Morrison v. Watson, 154 U. S. 115, the court says:

"If it was not claimed in the trial court, and therefore, by the law and practice of the state, as declared by its highest court, could not be considered by that court; or if it was not claimed in any form before judgment in the highest court of the state; it cannot be asserted in this court. Rev. Stat., see 709; Spies v. Illinois, 123 U. S. 131, 181; Schuyler 153 U. S. 535."

Third Point.

The second defense set up a certain action commenced in the district court of Lancaster county by one Thomas Bailey v. Charles W. Mosher et al. See Bill Exceptions 253-274. While the present action was commenced in the district court of Seward county. On pp. 256, 258 and 270 of the bill all the names of parties to that suit appear in full. Neither David E. Thompson or the Jones National Bank were parties plaintiff or defendant in said action, and plaintiff in error cannot base a federal right belonging to him, and how Mr. Thompson can claim a federal right upon this judgment, as against the Jones National Bank,

is beyond our comprehension. He did not even assign this as error and is therefore concluded (Record No. 230, 101 to 104). But still that is not enough:

"The fact that a suit is brought to recover the amount of a judgment of a court of the United States does not, of itself, make it a suit arising under the constitution and laws of the United States."

Metcalf v. Watertown, 128 U. S. 587.

See large number cases cited under this case in Russell and Winslow syllabus digest, p. 2620.

The cause of action set up in the amended petition by Thomas Bailey (p. 7, Record No. 232) is not like the petition set up in the plea in bar. This is clearly shown by the opinion of Shiras, J., in Bailey v. Mosher et al., 74 Fed. 125, and by Thayer, J., in 107 Fed. 561. If the cause of action in the first petition was one in, and belonged to the receiver of the bank, and the cause of action in the petition at bar is one for damages for fraud and deceit at common-law, then there is nothing in the plea in bar because both petitions are not for personal damages caused, and belonging to Thomas Bailey, and if this court should adopt the same construction placed upon the petition at bar as placed thereon by Shiras, J., Thayer, J., and the state courts, in this record, then the motions to dismiss or affirm filed in each of these several cases should be sustained.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

CHARLES E. YATES ET AL.,
Plaintiffs in Error,
vs.
JONES NATIONAL BANK,
Defendant in Error.

No. 230.

CHARLES E. YATES ET AL.,
Plaintiffs in Error,
vs.
UTICA BANK,
Defendant in Error.

No. 231.

CHARLES E. YATES, ET AL.,
Plaintiffs in Error,
vs.
THOMAS BAILEY,
Defendant in Error.

No. 232.

CHARLES E. YATES ET AL.,
Plaintiffs in Error,
vs.
BANK OF STAPLEHURST,
Defendant in Error.

No. 233.

ERROR TO THE SUPREME COURT OF NEBRASKA.

BRIEF OF DEFENDANTS IN ERROR.

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Attorneys for Defendants in Error.

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vs.
BANK OF STAPLEHURST,
Defendant in Error.
No. 233

ERROR TO THE SUPREME COURT
OF NEBRASKA

BRIEF OF DEFENDANTS IN ERROR.

History of Cases.

These four suits were instituted in the District Court of Seward County, Nebraska, February 25, 1895, by tthe Jones National Bank, The Bank of Staplehurst, The Uttica Bank and Thomas Bailey, separately, against Charles W.. Mosher, Richard C. Outcalt, Homan J. Walsh, Charles EE. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Rollo O.. Phillips and David E. Thompson, except that Mr. Thomppson was made defendant only in the cases of The Jones National Bank and the Bank of Staplehurst.

Defendant Stuart having failed to answer, juudgments were rendered against him, which were affirmeed by the State Supreme Court in Stuart v. Bank of Staplehurst, 57 Neb. 576.

Defendant Phillips died before the trial in tthe State Court, but the action as against him was not revivved.

Defendants Hamer and Walsh also died while tthe cases were pending in the State Court and the acticons were revived in the names of Louisa Hamer, Adminnistratrix, and George W. and Warren W. Walsh, Adminnistrators, respectively.

Trial was had during May and June, and on July 21, 1902, judgments were rendered in favor of ddefendant Walsh, and against defendants Mosher, Outcalt,, Thompson, Yates, and Hamer, Administratrix.

All those against whom judgments were entereed, prosecuted error proceeding to the Supreme Court of tthe State, where the judgments were affirmed; but only TThompson, Yates and Hamer, Administratrix, have prosecuted error proceedings to this court.

On March 29, 1895, the defendants removed the cases to the Circuit Court for the District of Nebraska, (Jones Rec. 66), but on July 27, 1897, on motion of plaintiffs, they were remanded to the State Court (id. p. 79) for the reason that the petitions did not present a federal question. See opinion in Bailey v. Mosher, 74 Fed. Rep. 15.

Amended petitions were filed May 3, 1897, (id. 71) which were again amended by interlineation on March 6, 1899, (id. 80) and on April 15, 1899, the cases were again removed to the Federal Court, (id. 81).

Plaintiffs motions to remand were overruled by the Circuit Court, but on error to the Circuit Court of Appeals, the order was reversed and the cases ordered remanded. (See opinion in Jones v. Mosher 107 Fed. Rep. 561).

The cases were accordingly remanded on May 6, 1901, (Jones Rec. p. 84) and trial had in the State Court as above stated.

History of Bank.

For some years prior to June, 1883, Marsh Bros., Mosher & Co. were doing a collecting and banking business at Lincoln, Nebr., the business consisting mostly in handling the paper of certain companies engaged in manufacturing harvesters, etc., at Sycamore, Illinois.

In June, 1883, the Marsh National Bank was incorporated with a purported capital stock of $100,000.00, but no money actually went into the bank, the assets and liabilities of Marsh Bros., Mosher & Co., having been transferred, en masse, to the Marsh National Bank.

It appears quite clearly that the Bank was, at its inception, insolvent, and its history up to the time it closed its

doors presents a series of the most flagrant cases of corruption and dishonesty known to the annals of banking.

In May, 1884, its name was changed to the Capital National Bank, and it was at this time the defendants became directors; and they so continued until it closed its doors, January 21, 1893.

At the time of its failure, its liabilities amounted to $1,761,062.38, while its assets (exclusive of the stock assessment) amounted to $180,494.52.

While the bank was a going concern, the directors published from time to time, in the newspapers of the City of Lincoln, Nebraska, statements of the financial condition of the Bank, showing it to be not only solvent, but prosperous, when in fact, it was at all times insolvent.

They also published in such newspapers a card, giving the names of the directors and representing the Bank as having a capital stock of $300,000.00 when in fact it had none. (Bill of Ex. p. 25)

Relying upon these representations, and believing them to be true, the plaintiffs deposited their money in the Bank and lost it, and thereupon brought these suits against the directors as individuals for fraud and deceit.

It is unnecessary to repeat the contention of defendants, as it is very ably set forth in two briefs filed in their behalf.

Twelve assignments of error are relied upon for reversal.

We believe it will avoid prolixity to discuss generally the principles involved in the consideration of these cases, rather than review the assignments seriatim.

Argument.

I. **An action for deceit may be maintained against the**

directors of a bank by depositors induced to become such by false representations or statements of the bank's condition made by such directors.

(a) The directors of a bank who publish false statements of its condition thereby represent that the matters of fact therein stated are within their personal knowledge, and, if they have no such knowledge, the statement is knowingly false.

(b) While it is said that to constitute actionable fraud there must be scienter, it is universally conceded this does not mean actual knowledge, and where the representation is of a fact, made by one in position to know, whose duty it is to know, or where it would constitute gross negligence not to know, such knowledge will be conclusively presumed.

II. Section 5239 Rev. St. U. S. neither abrogates nor modifies the common-law action of deceit.

III. The petitions charge the common-law action of deceit, and are not based upon violations of the national banking act.

IV. The cases were tried as actions for fraud and deceit, and not for negligence or malfeasance in office.

V. Although the petitions state matters which would constitute a cause of action under the national banking act (which we deny) they clearly state a common-law action of deceit, which, being supported by the evidence, is sufficient to sustain the judgments.

VI. The defendants have been denied no title, right, privilege or immunity conferred by the constitution, or any statute or treaty of the United States.

VII. *(res judicata) The decision in Bailey v. Mosher, (63 Fed. 488) was not a bar to this action.

I. AN ACTION FOR DECEIT MAY BE MAINTAINED AGAINST THE DIRECTORS OF A BANK BY DEPOSITORS INDUCED TO BECOME SUCH BY FALSE REPRESENTATIONS OR STATEMENTS OF THE BANK'S CONDITION MADE BY SUCH DIRECTORS.

(a) THE DIRECTORS OF A BANK WHO PUBLISH FALSE STATEMENTS OF ITS CONDITION THEREBY REPRESENT THAT THE MATTERS OF FACT THEREIN STATED ARE WITHIN THEIR PERSONAL KNOWLEDGE, AND IF THEY HAVE NO SUCH KNOWLEDGE, THE STATEMENT IS KNOWINGLY FALSE.

(b) WHILE IT IS SAID THAT TO CONSTITUTE ACTIONABLE FRAUD THERE MUST BE SCIENTER, IT IS UNIVERSALLY CONCEDED THIS DOES NOT MEAN ACTUAL KNOWLEDGE, AND WHERE THE REPRESENTATION IS OF A FACT, MADE BY ONE IN POSITION TO KNOW, WHOSE DUTY IT IS TO KNOW, OR WHERE IT WOULD CONSTITUTE GROSS NEGLIGENCE NOT TO KNOW, SUCH KNOWLEDGE WILL BE CONCLUSIVELY PRESUMED.

The case of Prescott v. Haughey, 65 Fed. Rep. 653, is

*(The plea of res judicata applies only to the case of Thomas Bailey.)

one that is on all fours with these cases. Baker, J., in a very able opinion reviews the authorities and discusses the principles involved. It seems to us his reasoning is unanswerable and we especially urge a careful reading of his opinion.

The syllabus is as follows:

"Directors of a national bank, who, in the pretended performance of duties imposed upon them by law, use their official station to make false and fraudulent representations, which are believed and acted on by others, are liable to one defrauded thereby in a common-law action of deceit, and the right to maintain such action is not precluded by the liability imposed in the national banking law for violation of its provisions. * * *

"A complaint alleged that defendants, directors of a national bank, published advertisements, statements, and reports representing that the bank was solvent and prosperous, knowing such representations to be false and the bank to be hopelessly insolvent, intending thereby to deceive the public and plaintiffs; that plaintiffs had no knowledge that said representations were false, and the bank insolvent, and, relying on said representations, were thereby induced to deposit with the bank a certain sum; that said representations deceived plaintiffs, and by reason of the premises they had been damaged in said sum. Held, that the representations charged, if made by the directors under color of their office, were entirely outside of their official duties, and the cause of action stated was a common-law cause of action for deceit, presenting no federal question which could sustain a removal of the cause from a state court. Bailey v. Mosher, 11 C. C. A. 301, 63 Fed. 188; distinguished."

On page 655 of the opinion, Baker, J., says:

"It is apparent that the cause of action does not sound in tort for any acts of misfeasance or non-feasance on the part of the defendants, as directors, causing damage or

loss to the bank. It does not appear that the bank has suffered any injury by reason of the fraudulent acts complained of. On the contrary, it became possessed of $35,000 of the moneys of the plaintiffs as the direct and intended results of the false and fraudulent representations of the defendants. Hence the bank, if not benefited, certainly was not injured by the fraudulent acts of its directors. It is therefore certain that neither the bank, nor the receiver who now represents it, could maintain any action for the wrongs complained of. Unless the plaintiffs can maintain an action for the redress of the injury which they alone have suffered, the defendants cannot be made answerable for their false and fraudulent conduct. **It would be a matter of just reproach if the law were so impotent as to afford no redress to a party who had been deprived of his money or property by false or fraudulent representations.** The fraudulent representations charged in the complaint, if made under color of their office, were entirely outside of the official duties of the directors. Neither the law nor the obligations of their office made it any part of their duty to utter and publish false and fraudulent advertisements, statements, and reports in regard to the condition of the bank. The tort for which they are sued was committed in their private and personal capacity, because the law does not confer upon such officers any authority to commit frauds of the character complained of. These directors have used their official stations to enable them to perpetrate a fraud on the plaintiffs entirely outside of the legitimate scope of their duties. It could, in no event, become a part of their duties to procure money to be deposited in the bank by false and fraudulent representations. * * * In the case in hand the plaintiffs seek to recover damages for an injury which could in no event give a right of action to the bank or to its receiver, or to any other creditor than the plaintiffs. If the frauds complained of do not give a right of action to the plaintiffs, the defendants will entirely escape liability for the fraudulent representations, as shown by the complaint, of the most flagitious character. I do not believe the law is justly obnoxious to such a reproach. In my opinion, the settled doctrine of the law is that if, in the pretended performance of duties imposed upon them by law, the directors of a bank use their official station to

make false representations, which are believed and acted upon by third parties, they are liable to respond for the injury done to the one defrauded thereby, and that the liability provided for in the National Banking Act cannot be deemed to preclude the right to maintain a common-law action of deceit for such false and fraudulent representations."

The existence of the common-law remedy for deceit is recognized in Gerner v. Thompson, 74 Fed. Rep. 125, the syllabus of which is as follows:

"An action against the directors of a national bank under the provisions of Rev. St., Sec. 5239, can be maintained only by a receiver of the bank; and an action by a private individual against such director for damages arising from the making of false reports, or other violations of the National Banking Act can only be maintained as an action at the common-law in the nature of an action of deceit."

The decision in Bailey v. Mosher, 63 Fed. Rep. 488, while it held the petition in that case to declare upon the violation of Sec. 5239, concedes the existence of the common-law remedy of deceit. Referring to the opinion in that case, Shiras, J., in Gerner v. Thompson, 74 Fed. Rep. 126, says:

"The effect of this decision, if I correctly apprehend its meaning, is that rights of action created by the provisions of the Banking Act are to be deemed part of the assets of the corporation, and, as such, are enforceable only by the receiver in case the bank has become insolvent; but rights of action arising at the common-law, and growing out of transactions not injuriously affecting the capital stock or the interests of the shareholders at large, may be enforced by anyone suffering special injury thereby."

In Merchants National Bank of Hillsboro v. Thomas,

28 W. L. B. (Ohio) page 164, it was held that "the plaintiff is entitled to recover in an action for deceit the amount of his damages from those officers who fraudulently signed said reports." The opinion in that case very ably discusses the principles involved.

Speaking of it, the Supreme Court of Nebraska, in Gerner v. Mosher 58 Neb. 146, says it "is enforced by so clear and so able an opinion that it logically carriers more weight than many decisions of higher courts."

Solomon v. Bates, 118 N. C. 312; 24 S. E. 478, was an action against directors of a bank for false representations as to its financial condition. The facts are identical except that the defendants were directors of a state bank instead of a national.

It holds not only that the directors are liable, but that it is **not necessary that they shall know the false statements to be untrue,** and that they are liable for damages sustained by anyone dealing with a corporation relying on the truth of such official reports.

To quote from the opinion of Clark, J., id 480:

"Indeed, the directors are liable for injury caused by relying upon a statement issued by them which they do not know to be true, as well as when they know it to be false. Hubbard v. Ware, 79 Ia. 678; 44 N. W. 915; Huntington v. Attrill, 118 N. Y. 365; 23 N. E. 544; 42 Hun. 459; 3 Thomp. Corp. Section 4244. If bank directors do not manage the affairs and business of the bank according to the charter and by-laws, and use ordinary diligence to supervise the conduct of their office, and to understand the condition of the bank, and loss ensues, they are liable for all losses their misconduct may inflict either upon stockholders or creditors. 1 Morse, Banks, Section 138. 17 Am.

& Eng. Enc. Law 109, and cases cited. They are trustees for depositors, and can be held liable for injuries resulting from gross negligence on their part in allowing the bank to be held out to the public as solvent, when it is in fact insolvent. 1 Morse, Banks, Section 130a. We adopt what is so well and forcibly said in Delano v. Case, supra: 'Ordinarily, the character of the directory for integrity and business capacity increases the degree of confidence reposed in the corporation by the public. Were depositors, when intrusting to a bank their entire fortune, to be informed that the directors, upon whose honor and careful watchfulness they were relying, owed them no duty, were under no obligation to take, at least, reasonable precautions to guard their money from the itching fingers of dishonorable officials, they would certainly hesitate long before surrendering it upon such terms.' For false statements of the condition of the bank, published by authority of the directors when they knew of the falsity, or with reasonable care might have known it, the directors are personally liable. * * * Good faith alone will not excuse them when there is lack of the proper care, attention, and circumspection of the affairs of the corporation, which is exacted of them as trustees. * * * As said above, it is not necessary that the directors should know that such reports are false; it is their duty to know that they are true. Huntington v. Attrill, supra; 3 Thomp. Corp. Section 4244; Hauser v. Tate, 85 N. C. 81, citing Bank v. Wulfekuhler, 19 Kan. 60; Bank v. St. John, 25 Ala. 566, and United Soc. v. Underwood, 9 Bush, 609."

Bartholomew v. Bentley, 15 O. 659; Am. Dec. 596-598, decided that:

"The act incorporating * * * conferred no authority upon any person to hold out false colors to deceive the public, * * * and those who combined to use it for the purpose of swindling, acted for themselves rather than as agents for the bank. They would make themselves liable, at all events, upon the general principle applicable to natural persons. * * * In Vose v. Grant, 15 Mass. 519, it is said:'* * * If any number of persons combine, with the intent to injure and defraud another, they cannot defend themselves against an action by showing that they did

the act in the character of corporators, under any charter whatever.' These are safe principles, founded in good sense, which we recognize as law." Id. 599.

"It may be that numerous suits will be prosecuted; * * * And yet the doctrine that because they have cheated thousands they are safer than they would be if only one man had suffered, does not obtain in courts of justice. * * * Again it is said the fund sought is a trust fund, and a bill in chancery is the proper remedy. There would be much propriety in the position, were it in point of fact true, that a party who has been defrauded by the act of another has no redress save out of a fund composed solely of the proceeds of the imposition. * * * But the rule that a person sustaining damage by fraudulent acts of another can only look to a particular fund of the wrong-doer for redress, never existed anywhere. * * * In this case the damages to be recovered should be commensurate with the injury done to the plaintiff, which will not in any sense depend upon the state of the assets of the bank, or its solvency. The judgment, therefore, that may be recovered will not effect trust funds, strictly so-called, but general funds, the rights, credits, and effects of the individuals instrumental in committing the fraud complained of. * * * It is not of any moment that the defendants should have made a profit by their frauds. That is an inquiry that cannot affect the plaintiff's rights. The gist of his complaint is, that they, by their acts have imposed upon him, and that he has sustained an injury by means of the imposition." Id. 598-599.

We have quoted thus fully from Bartholomew v. Bentley because it states so clearly the principles underlying an action for deceit.

In Marshall v. Farmers & Mechanics Savings Bank of Alexandria, 85 Va. 676; 17 Am. St. 84, the court (p. 90) quotes with approval from Morse on Banks and Banking, page 133, as follows:

"If bank directors do not manage the affairs and business of the bank according to the directions of the charter, and in good faith, they will be liable to make good all losses which their misconduct may inflict upon either stockholders or creditors, or both; Hodges v. N. E. Screw Co. 1 R. I. 312, 53. Am. Dec. 624. They may be held to account to an injured party in a court of chancery, or they, or any one of their number who shares in the wrong-doing may be sued at law for damages."

And holds (p. 84) that directors of a banking corporation are liable to depositors for losses resulting from their negligence and inattention, and **that want of knowledge of wrong-doing will not exonerate them because it could not exist except through negligence.**

"The publication by savings bank directors, that directors and stockholders are personally responsible for its debts, does not constitute a contract with depositors, but if intentionally false, affords the basis of an action for deceit."

Westervelt v. Demarest, 46 N. J. Law, 37; 50 Am. Rep. 400.

"It appearing, as one of the findings of fact in the case, that the plaintiff made his deposits relying upon the truth of this statement, he would be entitled to recover the loss he sustained by acting upon it, in an action for deceit." Id. p. 402.

"The directors of a bank are personally liable, at the suit of a depositor, for damages sustained by reason of the insolvency of the corporation, when the depositor is induced to place money in the bank solely by false representations of solvency made to the general public by the directors, **who ought to have known, and, by the use of ordinary care, such as it was their duty to have exercised, might have known,** that such representations were false, and they are so liable whether such representations were made with the intent to defraud or not."

Seale v. Baker, 70 Tex. 283; 8 Am. St. 592.

The facts in Seale v. Baker, supra, were identical with the cases at bar with the exception that the bank of which they were directors, was not a national bank.

In the opinion, Acker, J., quoting from Bartholomew v. Bentley, 15 O. 666, says:

"A valid act of incorporation, or an invalid and pretended right to exercise corporate franchises, is alike powerless to secure the guilty from the consequences of their fraudulent conduct, where it has been knowingly resorted to as the mere means of chicane and imposition, and used to facilitate the work of deception and injury. Were it otherwise, it would be a reproach to the law."

And again, 8 Am. St. 602, (quoting) says:

"There is no wrong or fraud which the directors of a joint stock company, incorporated or otherwise, can commit which cannot be redressed by appropriate and adequate remedies. * * * (p. 603). This is what is called an action of deceit, the plaintiff alleging that statements were made by the defendants which were untrue, and that he had acted on the faith of these statements so as to incur damage for which the defendants are liable."

In the closing paragraph, id. p. 604, he says:

"Forms of action do not obtain in our practice." (This is likewise true in Nebraska). "All suits are actions on the case, and we think it can make no material difference in determining the questions here involved, whether the suit is called an action for deceit, an action to recover damages for the violation of a trust, or an action to recover damages for negligence in the performance of a duty."

Special action on the case may be maintained for every fraud or deceit, which results in consequential damage to

a party, and it is no defense to such action that the fraudulent acts were done by persons acting in the capacity of corporators.

Bartholomew v. Bentley 15 O. 660.

Where by false representations fraudulently made and published by directors of a corporation, or with their sanction, the creditor is induced to loan money to the corporation, or to make a deposit, or to purchase its debentures he may undoubtedly have an action against those directors for damages where the loan or deposit is lost or the securities become worthless. Zimm v. Mendel, 9 W. Va. 580; Schley v. Dixon, 24 Ga. 273; Weir v. Barnett, L. R. 3, Exch. Div. 32.

"If the officers of a banking corporation misrepresent its condition whereby a person is led to deposit his money therein and lose it by reason of the unsafe condition of such bank, they are liable to such depositor directly to make good such loss, only upon the grounds of deceit."

Killen v. State Bank; 106 Wis. 546; 82 N. W. 536.

In an action of deceit against the directors of a national bank to recover damages sustained by persons who had loaned money and taken as collateral security therefor the stock of the bank, relying upon the statement of the directors as to its financial condition, it is no defense that the bank has been placed, by the comptroller of the currency, in the hands of a receiver, or that the receiver has settled with the directors and released them from all liability.

Barnes v. Pogue, (Supt. Ct. Cin.) 29 Weekly Law Bulletin 382; (Ohio 1893).

Cassidy v. Uhlmann, et al., 170 N. Y., 528; 63 N. E. 554, was an action against the president and two directors of a bank to recover damages for their alleged fraud and deceit in directing and permitting said bank to remain open for the transaction of business after they knew it to be hopelessly insolvent, and it was therein held that they were personally liable for damages to a depositor who, in ignorance of such insolvency, deposited money in the bank.

In the opinion, Werner, J., says: (p. 560)

"The insolvency of the bank made the directors trustees for its creditors."

In United Society of Shakers v. Underwood, 9 Bush, 609; 15 Am. Rep. 731, it was held that directors are liable for the loss of a special deposit, wrongfully converted by officers of the bank, of which conversion defendants had, or by the exercise of ordinary diligence, could have had knowledge.

Graves v. Lebanon National Bank, 10 Bush, 23; 19 Am. Rep. 50, was an action brought by a national bank against the sureties on the cashier's bond. It appeared that the sureties had been induced to sign the bond by statements of the bank's condition published by the directors in accordance with the requirements of the National Banking Act, whereby the affairs of the bank appeared prosperous and well managed, when, in fact, the bank was not in good condition, and the cashier had committed frauds and made false entries on the books to conceal them, and it was

held that the sureties were not liable because they had a right to believe that, before publishing the statement, the directors had used reasonable diligence in ascertaining the condition of the bank and being misled by the statement, the sureties were not bound.

In the opinion, id. 54, it is said:

"It may not be true that the directors of the Lebanon Bank had actual knowledge of the frauds committed by Mitchell while cashier of Burton, Mitchell & Co., nor of the false entries made by him on the books of the institution under their control in order to conceal those frauds, but it is true that either **with or without examination, they published reports of the affairs of the banking institution, and the natural, if not the necessary effect of which was to mislead the public.**"

"Depositor in bank may recover from its directors for damages resulting to him from negligence in permitting it to be held out to the public as solvent, when it was insolvent."
Delano v. Case, 121 Ill. 247; 2 Am. St. 81.

That the principles contended for have been the recognized law of the State of Nebraska, prior to the decision in these cases, will appear in the following cases: Stuart v. Bank of Staplehurst, 57 Neb. 576; Gerner v. Mosher, 58 Neb. 135; which was reaffirmed in 61 Neb. 100.

Text Books.

The writers agree with the principles laid down in the foregoing cases.

"The agents of a corporation are subject to the general rule of the common-law, that a person is liable for direct consequences of fraudulent representations whereby an-

other is misled. Thus, it has often been decided that directors are liable for fraudulent representations as to the financial condition of the company, whereby others are induced to give credit to the company, or to purchase its obligations or shares of its stock."

1 Morawetz Pri. Cor. Sec. 573.

Speaking of the liability of directors, Thompson, in his commentaries on the law of corporations, Vol. 3, Sec. 4091, says:

"1. He is, as already stated, liable to his principal for breaches of the duties he has assumed towards him, or, as the books more briefly express it, for **non-feasance.**

"2. He is also liable for trespasses, frauds, or other wrongs which he may commit against third persons while discharging the duties of his agency; or, as the books more briefly express it, for **misfeasance.** And he is none the less liable for acts of **misfeasance** from the fact that his principal may also be liable."

Id. Section 4092: "Strangers have any appropriate remedy against the directors of a corporation which one man may ordinarily have against another in the ordinary relations of civil society, not resting in contract."

Id. Section 4144. "Acts of this kind (issuing false prospectuses, making false representations, etc., whereby the public are deceived) fall within the category of acts of **malfeasance,** for which the directors participating therein are personally liable, notwithstanding the fact that the corporation may also be liable on a principle already stated. * * * They are personally liable to a stockholder for a loss of money which they induce him to loan to the corporation by false representations made fraudulently, **or in ignorance of matters which it was their official duty to know.**"

Id. Section 4145. "Thus, it has been held that **bank**

directors, who permit the bank to be held out as solvent, when they knew it to be insolvent, may be sued by a depositor for the damages which he has thereby sustained."

It is not necessary that the representations were made directly to the plaintiff, nor that they were concocted with the view of deceiving particular persons, but it will be sufficient if they were contained in circulars or other advertisements. Id. Vol. 2, Sec. 1472.

"Directors or officers of a corporation, who, as such commit frauds or torts upon third persons, are personally liable therefor, without reference to whether the corporation itself is liable or not.

Officers or directors of a bank or other corporation, who, by false representations or reports of its financial condition, or false prospectuses or the like, induce persons to subscribe for stock, or to deposit money with the corporation, or to enter into contracts, or otherwise to deal with it on the faith of such false representations, are liable to such persons for any loss or injury occasioned thereby. The liability in such cases is founded on the tort, and does not depend upon any privity of contract between the parties."

21 Am. & Eng. Enc. of Law, 2nd Ed. p. 880, and cases cited in notes.

"The directors are liable to depositors for gross neglect of their duties and for mismanagement, as well as for fraud and deceit, but not for errors of judgment made in good faith."

3 id. 845 note and cases cited.

"An officer of a corporation who fraudulently makes false representations for the purpose of inducing others to contract with the corporation, is personally liable in an action of deceit."

14 id. 154 and cases cited.

"A report or prospectus issued by the promoters, or by the directors or other officers of a corporation to the public generally, containing false statements as to the condition or affairs of the corporation, intended to induce persons to subscribe for, or purchase stock in the corporation, or otherwise deal with it, is to be considered as made to any person within the class contemplated who shall act thereon; and if a person does act thereon, and sues for damages, it is no defense to say that the statements were not made direct to him."

14 id. 151 and cases cited.

Directors Duty to Know.

The duties of directors was referred to in Auten v. U. S. Nat. Bk., 174 U. S. 147; 19 Sup. Ct. 637, (decided April 24, 1899).

We quote from Mr. Justice McKenna, who wrote the opinion of the court:

"This court said by Mr. Justice Harlan, in Martin v. Webb, 110 U. S. at page 15; 3 Sup. Ct. at page 433; 'directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of those officers. They have something more to do than from time to time **to elect officers of the bank and to make declaration of dividends.** That which they ought, by proper diligence to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business.'"

In Briggs v. Spaulding, 141 U. S. 141, 11 S. C. 924, the question of the duty of directors arose between the corporation and those it had chosen as its directors, while in

Martin v. Webb, and Auten v. U. S. National Bank, the question arose between the bank and third parties and the language is:

"That they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers," etc.

It is obvious that in a transaction with third parties the directors should be held to a higher degree of accountability, because they have nothing to say as to the selection of directors, and as a rule are not in position to be able to judge their capability or integrity. Indeed it has been said in a number of well considered cases that, while the relation of directors to depositors is not technically one of trust, yet, for many purposes, it might be considered as such.

McClure v. People, 27 Colo. 371; 61 Pac. 617. In this case plaintiff in error was convicted of statutory larceny, in that, as president of a bank, he assented to the reception of deposits knowing at that time that the bank was insolvent. The statute provided in substance that if the president of any bank should receive or assent to the reception of any deposit of money in such bank or banking institution after he shall have had knowledge of the fact that such bank is insolvent, he shall be deemed guilty of larceny. The defendant "offered to show that he did not reside in the town in which the bank was doing business, gave little or no attention to it, that the actual management and control were in the hands of others, and that he did not possess any actual knowledge whatever as to its condition. * * * That he was an illiterate man, possessing no knowledge of

banking or bookkeeping, and that he was totally unable to determine from the books of the bank its condition even if he had made an examination with that purpose in view; that he was unacquainted with the people of the town of Rico and with the value of the securities held by the bank."

Campbell, C. J., who wrote the opinion of the court said: (p. 617):

"The question then is, may a banker, or an officer of a bank, exempt himself from criminal liability under the statute, by intentionally absenting himself from the bank and abstaining from participating in its management, and purposely neglecting to avail himself of means of information as to its financial condition, or by showing that if he had given attention to its business, his lack of fitness and unfamiliarity with banking methods, would not enable him to ascertain its true condition? The mere statement of the proposition, it seems to us is its own refutation."

The syllabus of the court is as follows:

"An officer of a bank cannot relieve himself from criminal liability for receiving deposits when the bank was insolvent by intentionally absenting himself from the bank and abstaining from participating in its management and purposely neglecting to avail himself of means of information as to its financial condition, or by showing if he had given his attention to its business by reason of his lack of fitness and ignorance of banking methods, he could not have ascertained its true condition."

The opinion is well sustained by argument and supported by an able review of authorities, and seems to us a complete answer to the pretentions of Mr. Thompson.

If such be the law in criminal cases, the rule in a civil action for deceit must certainly be no more lenient.

Mr. Thompson was a director of this bank from 1884 to

1893. During all this time it was his duty to aid in the active management and control of the bank, yet, during all that time he admits he made not the slightest effort to acquaint himself with its condition, or to assist in its management.

The Superintendent of a railroad; owner of nine hotels; in charge of the Lincoln Gas Co., the Lincoln Electric Co., President of the Farmers & Merchants Ins. Co., President of the Aurora State Bank, Vice-president of the American Exchange Bank of Lincoln, (p. 224), negotiator for the purchase of the Terra Haute, Ind., gas plant, and lastly, we are told, an Ambassador, permitting his name to be used to induce business for the bank, yet so grossly and criminally negligent as to never even make an effort to acquaint himself in the slightest with the affairs of the bank, and withall claiming to be so ignorant that even by the examining of the books or assets of the bank, he could not tell if it was insolvent! If he were so densly ignorant, he certainly deceived the patrons of the bank by pretending to have abilities which he had not.

In Hall v. Henderson, 126 Ala. 495; 28 So. 544, decided in 1900, Tyson, who wrote the unanimous opinion of the court, says, id. 543:

"The doctrine is stated by Thompson on Corporations (section 5308) to be: 'It is a sound view, at least in so far as the question respects the rights of third parties, that the directors of a corporation are in law **conclusively presumed** to know its condition, its business, its receipts and expenditures, and all the general facts which go to make up that condition and business, as shown by the entries on its regular books. The reason of this is that it is their duty to know these things in the exercise of their official func-

tions. This doctrine is said to be one founded in public policy, essential to the safety of third parties in their dealings with corporations, and to the protection of the stockholders interested in the welfare and safe management of corporations.' Justice Brewer, now of the Supreme Court of the United States, while a member of the Supreme Court of Kansas, in the case of Bank v. Drake, 29 Kans. 326, said: **'The directory, as has been said, is the visible representative of the bank. Persons dealing with it meet only this visible representative and have a right to presume that it knows all of the affairs of the bank, all that the bank as a principal ought to know of its condition and business.** On the other hand, the stockholders and depositors—the persons who are pecuniarily interested in the safe management and prosperity of the bank—look to the **directors as the chosen guardians of their interests, and have a right to demand of them that they watch over all those interests in their minute details. So that all of these parties have a right to assume that the directors know all the transactions, business, and condition of the bank, because they ought to know them, and because otherwise they do not discharge their full duties to these various parties.'"**

He also quotes with approval from Society v. Underwood, 9 Bush 609, wherein that court said: (id. 544 and 545)

"Bank directors are not mere agents, like cashiers, tellers, and clerks. They are trustees for the stockholders; and as to their dealings with the bank they not only act for it, and in its name, but, in a qualified sense, are the bank itself. It is the duty of the board to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. The community have the right to assume that the directory does its duty, and to hold them personally liable for neglecting it. Their contract is not alone with the bank. They invite the public to deal with the corporation, and when anyone accepts their invitation he has the right to expect reasonable diligence and good faith at their hands; and, if they fail in either, they violate a duty they owe not only to the stockholders, but to the creditors and patrons of the corporation. Hodges v. Screw

Co., 1 R. I. 312. * * * It is further objected that the allegation of notice is so far qualified as to render insufficient the averment of its existence. It is stated that appellees 'and each of them, had, or could have had by the use of the most ordinary diligence and investigation, ample notice.' It is also alleged by Davenport that they each 'had notice, as well from the ledgers, books, and accounts of said bank as from its correspondence, reconcilements, and statements.' It is the duty of bank directors to use ordinary diligence to acquaint themselves with the business of the bank, and whatever information might be acquired by ordinary attention to their duties they may, in controversies with persons transacting business with the bank, be presumed to have. They cannot be heard to say that they were not apprised of facts shown to exist by the ledgers, books, accounts, correspondence, reconcilements, and statements of the bank, and which would have come to their knowledge except for their gross neglect or inattention. It is not necessary, in many cases, to show directly that the directors actually had their attention called to the mismanagement of the affairs of the bank, or the misconduct of the subordinate officers. It is sufficient to show that the evidences of the mismanagement or misconduct were such that it must have been brought to their knowledge unless they were grossly negligent or wilfully careless in the discharge of their duties," and cites authorities in support thereof.

See also note to Henry v. Dennis (Me.) 85 Am. St. Rep. 388, 399, where it is said:

"Before making representations as to the condition of the corporation as inducements to take stock therein, or extend credit thereto, it is the duty of the officers to use reasonable diligence to know that the representations are true, and they will be presumed to have used such diligence, and to possess the knowledge which its exercise would bring them. * * * If false and fraudulent statements are put forth under the authority of the directors, **it is not necessary that they should know them to be such; it is their duty to know them to be true and they are liable for damages sustained by anyone dealing with the corporation, relying on the truth of such reports.** Solomn v. Bates, 118

N. C. 311; 54 Am. St. Rep. 725; Hustin v. Thornton, 122 N. C. 365; 65 Am. St. Rep. 699."

Scienter.

"Where directors of a national bank by their gross negligence permit fraudulent statements of the condition of the bank to be published, they are liable to a person misled and injured thereby, although they did not participate in the fraud."

Houston v. Thornton (N. C. 1898); 29 S. E. 827.

"A person falsely assuming a knowledge of certain facts and making representations thereto without knowing either the truthfulness or falsity thereof, is subject to the same liability for injuries resulting therefrom as if they were made with full knowledge of the facts."

Taylor v. Commercial Bank, 73 N. Y. S. 924; 68 App. Div. 458.

"An untrue representation of a material fact as ones knowledge, or recklessly made, not knowing whether it is true or not, is a fraud."

Snidley v. Maixsell, 97 Ill. App. 365.

"A representation may be actionable though the person making it did not know it was false."

Beatty v. Bulger, (Tex. Cir. App. 1902) 66 S. W. 893.

In Cooper v. Schlesinger, 111 U. S. 148; 4 Sup. Ct. 360, this court, held that "A statement recklessly made, without knowledge of its truth, is a false statement knowingly made, within the settled rule."

Again in Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665; 14 Sup. Ct. 219, Mr. Justice Harlan, delivering the opinion of the court observed:

"The court said, in substance, that a person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representation, to one who believes and acts upon them, as if he had actual knowledge of their falsity; that deceit may also be predicated of a vendor or lessor who makes material untrue representations in respect to his own business or property, for the purpose of their being acted upon, and which are in fact relied upon, by the purchaser or lessee, the truth of which representations the vendor or lessor is bound, and must be presumed, to know. * * * Where the representations are material, and are made by the vendor or lessor for the purpose of their being acted upon, and they relate to matters which he is bound to know, or is presumed to know his actual knowledge of their being untrue is not essetnia. We perceive no objections to these instructions."

Hindman v. First National Bank, 112 Fed. Rep. 931 (in which a writ of error was denied by this court April 28, 1902, 186 U. S. 483) was a common-law action of deceit against the bank for a false representation as to the condition of the Columbia Fire Ins. Co. made by the cashier of the bank (who was also an officer of the Insurance Company) by reason of which complainant was led to buy shares of the Insurance Company's stock. The circuit court of appeals sustained the right to the action and held that: "to sustain an action for fraud and deceit based on false representations by defendant by which plaintiff was induced to purchase property, it must be shown (1) that the representation was false, and (2) that the person making it knew it to be false; **but if the fact was one within his means of knowledge, and he had no knowledge of it, the jury is authorized to find that the statement was knowngly made."**

In the opinion, Lurton, J., (p. 944) says:

"If the fact be one within his means of knowledge and he have no knowledge of the fact, the jury would be authorized to believe that the statement was knowingly false."

In Martin v. Webb, 110 U. S. 7; 3 Sup. Ct. 428; it was said:

"That which directors ought, by proper diligence, to have known as to the general course of the bank's business, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with it upon the basis of that course of business."

"Directors are liable for injuries to a person who relies upon a statement issued by them, which they did not know to be true, as well as when they knew it to be false."

Morse on Banks and Banking, Sec. 132.

"What the directors ought to have known by a proper diligence as to the general course of the bank's business, they are presumed to have known in any contest between the bank and third parties dealing with it in good faith."

Id. Sec. 133.

"Where the cashier of a bank, acting within the scope of his authority, and for the purpose of enabling the bank to collect or secure a debt owing to it, makes false representations concerning the financial responsibility of a debtor to a person from whom such debtor is endeavoring to purchase goods upon credit, with knowledge that such representations are false, **or assuming to have positive knowledge of the facts, when as a matter of fact he has not such knowledge,** and thereby induces the party to whom the representations were made to sell the goods to the debtor upon credit, the bank is liable for the wrongful act of such cashier, although it was done without its authority or knowledge and resulted in no profit to it."

In Taylor v. Commercial Bank, 68 App. Div. (N. Y.) 460.

On page 462, McLennen, J., who delivered the opinion of the court, said :

"At all events, according to plaintiff's testimony, he made a material representation assuming to have knowledge of the facts, and therefore the liability is precisely the same as if made with knowledge of its falsity.

"An action to recover damages for deceit cannot be maintained without proof of fraud, as well as injury, but the fraud may consist in the affirmation of positive knowledge of that which one does not positively know; and where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not, and it is actually untrue, he is guilty of falsehood, even if he believes it to be true."

Hadcock v. Osmer, 153 N. Y. 604; 47 N. E. 923.

In Haddock v. Osmer, supra, Vann, J., quotes with approval from the opinion of Judge Peckham in Rothschild v. Mack, 115 N. Y. 7; 21 N. E. 726, as follows:

"He either knew or he did not know of the financial condition of the makers of the note. If he did know it, then he knew that the note, as to both makers and endorsers, was without value. If he did not know its condition, he yet assumed to have actual knowledge of the truth of his statement. * * * He certainly meant to convey the impression of actual knowledge of the truth of the representation he made as to the value of the note, and he either knew such representations were false, or else he was conscious that he had no actual knowledge while assuming to have it, and intending to convey such impression. If damage ensue, this makes an actionable fraudulent representation."

He also quotes from the opinion of Chief Justice An-

drews, in Kountze v. Kennedy, 147 N. Y. 124, and Furnace v. Moffitt, 147 Mass. 403; 18 N. E. 168, where the same principle is sustained.

We have referred especially to the New York cases because of the statement contained in brief on behalf of Mr. Thompson that they held otherwise.

It would extend this brief to an unreasonable length to review all the authorities sustaining this principle.

The rule is well stated, and decisions in support thereof from nearly every State cited in a very able article in 20 Cyc. p. 27, wherein it is said:

"It is not always necessary that the speaker should actually know that his representation is false. If the statement is of a matter susceptible of accurate knowledge, and he makes it recklessly, without any knowledge of its truth or falsity, and in the form of a positive assertion calculated to convey the impression that he knows it to be true, the representation is equally fraudulent. The rule just stated applies, although the speaker honestly believes that the fact which he represents as existing actually does exist.

In such case it is apparent that he cannot believe in the truth of the statement he makes—that he knows the fact to exist—and the fraud consists in passing off his opinion or belief in the guise of positive knowledge. Consequently the speaker is not relieved from liability, although in making the assertion he relies upon trustworthy information." id. p. 29 note. "This rule is not an exception to, but an application of, the principle that actual fraud must be shown to sustain an action of deceit; and it is not in conflict with the rule requiring a scienter." See cases cited.

A wide distinction exists between representations, which in their nature can be nothing more than mere expressions of opinion, and those made as representations of facts

within the knowledge of him who makes them. The former is illustrated by statements made concerning the solvency of third parties; the latter by statements made by one concerning his own financial condition or that of a corporation of which he is a director.

The authorities cited on behalf of plaintiffs in error, involved cases belonging to the former class.

Thus, Lord v. Goddard, 13 How. 109, was an action against Lord for damages sustained by the plaintiffs by reason of having extended credit to West & Daby upon the recommendation of Lord that they were well worthy of credit. It was a matter upon which Lord could have had no actual knowledge, but was apparently giving merely his opinion.

In the syllabus this court held:

"The gist of an action for false representation concerning the credit of another, is the fraud of the defendant and damage thereby done to the plaintiff."

Referring to this decision (Lord v. Goddard, supra) in Lord v. Colley, 6 N. H. 99; 25 Am. Dec. 445, at note on page 499, it is said:

"But more recent considerations of this question have led the courts to adopt a more comprehensive construction of 'fraudulent' as used in the rule."

The case of Daly v. Wise, 132 N. Y. 306; 30 N. E. 837, cited by plaintiffs in error does not sustain the principle contended for.

In the opinion (30 N. E. 839) Follett, C. J., who delivered the opinion says:

"In case a party, for the purpose of inducing another to contract with him, states, on his personal knowledge, that a material fact does or does not exist, without having knowledge whether the statement is true or false, and without having reasonable grounds to believe it to be true, he is liable in fraud, if the statement is relied upon, and is subsequently found to be false, **although he had no actual knowledge of the untruth of the statement.**" Citing authorities from which it appears that actual knowledge is not essential. The case went off on a question of fact as appears in the closing paragraph of the opinion:

"It does not appear that the plumbing had not been fixed as stated, nor that the statement that 'it was all in good condition' was made without actual or supposed knowledge of its condition, nor that it was made in bad faih; and we think the case does not fall within the principle of the authorities last cited."

The case of Ming v. Woolfolk, 116 U. S. 599, 602; 6 Sup. Ct. 489; does not sustain the contention of plaintiffs in error.

All this case decided was—"A party cannot recover damages for deceit practiced upon him unless he can prove that he has suffered by the deceit."

The portion of the opinion quoted in Mr. Rose's brief was merely the statement of general principles of law cited by Mr. Justice Wood, who delivered the opinion, as authoity for the doctrine that in order to sustain an action for deceit it is necessary that the complaining party altered his condition in consequence of such representations **whereby he sustained damages.**

The question of knowledge or scienter is not discussed, nor does the learned Justice refer to what would or would not constitute knowledge. A casual examination of this opinion will show that it is not authority on the point for which it is cited.

The same is true in Gordon v. Butler, 105 U. S. 553, 556. In this case the defendants had given their opinion as to the value of lands supposed to contain sandstone quarries, which had not been developed, as the plaintiff was aware, and whose value he knew to be conjectural.

It was held that the action would not lie, "the defendants not being liable for an expression of opinion, however fallacious, in regard to property, the value of which depends upon contingencies that may never occur, or developments that may never be made."

In the opinion Mr. Justice Field, p. 557, says:

"How could an overestimate in such a case be shown? Other estimates would be equally conjectural. The law does not fasten responsibility upon one for expressions of opinion as to matters in their nature contingent and uncertain. Such opinions will probably be as variant as the individuals who give them utterance. * * * (558). For opinions upon matter capable of accurate estimation by application of mathematical rules or scientific principles, such, for example, as the capacity of boilers, or the strength of materials, the case may be different. So, also, for opinions of parties possessing special learning or knowledge upon the subjects in respect to which their opinions are given, as of a mechanic upon the working of a machine he has seen in use, or of a lawyer upon the title of property which he has examined. Opinions upon such matters are capable of approximating to the truth, and for a false statement of them, where deception is designed, and injury has followed from reliance on them, an action may lie."

Kountze v. Kennedy, 147 N. Y. 124; 41 N. E. 414, recognizes the principles we contend for. This decision was by a divided court, Bartlett, J., dissenting, and Peckham, J., not voting. Andrews, C. J., who wrote the majority opinion of the court, says:

"We have referred to a representation made without knowing whether it was true or false, and where the party making it was indifferent whether it was true or false, as sufficient to sustain the action if the representation was in fact untrue. The making of a representation to influence the conduct of the person to whom it is made, carries with it an assurance, necessarily implied from the situation, of the belief of the party making it in the truth of the affirmation. As was said by a Maull, J., in Evans v. Edmonds, 13 C. B. 777, 'He takes upon himself to warrant his own belief of the truth of that he asserts, and a man who makes a representation which he neither knows nor cares whether it is true or not, can have no real belief in the truth of what he asserts, and is justly guilty of deception.' So, also, it has been held that one who falsely asserts a material fact, succeptible of accurate knowledge, to be true of his own knowledge, and thereby induces another to act upon the fact represented to his prejudice commits a fraud which will sustain an action for deceit. This is not an exception to, but an application of, the principle that actual fraud must be shown to sustain such an action. The purpose of the party asserting his personal knowledge is to induce belief in the fact represented, and if he had no knowledge, and that fact is one upon which special knowledge can be predicated, the inference of fraudulent intent in the absence of explanation naturally results."

In this case the referee found as a question of fact that the representation was made in the belief that it was true, and that the principal matter which had been misstated consisted of a claim of doubtful validity concerning which the defendant had been advised by counsel that it was not a valid claim. The referee also found that the statement of assets and liabilities declared upon was not made by the defendant as being within his personal knowledge. To quote:

"Certainly the mere presentation of such a statement, without more, would not amount to an affirmation that the statement was true to his knowledge."

Bartlett, J., dissented, "on the ground that it is not proper for an officer of a corporation making a written statement of its indebtedness to a proposed purchaser of its stock to omit therefrom the amount involved in a pending action against the company for the reason that he is of the opinion that the company will not be held in final judgment; that it is the manifest duty of such officer to inform the proposed purchaser of stock of the existence of this contingent liability, and the failure to do so is a fraud."

Nature of Representation.

The representations upon which these deposits were made recite that they are **reports of the condition of the bank at the close of business on a certain day.** They are signed by the directors, with the words "CORRECT. ATTEST:" The report itself purports to be a statement of a matter which the makers know to be true, and it is strengthened by the significant words "Correct. Attest." The word "correct" as defined in Webster means "conformable to proof, rectitude, not faulty or imperfect, free from error" and is said to be synonymous with "accurate, right, exact, precise, faultless." The word "attest" is defined by the same authority to mean "to certify; to affirm to be true or genuine; as to attest the truth of a writing."

When a director signs this statement he says in substance:

I am a director of this bank. As such it is my duty to actually and actively manage the affairs of the bank and know its true condition. I have performed that duty and the foregoing statement of the bank's condition is true, exact, precise, faultless, and free from error.

That is what it means to those to whom it is directed,

whether to the public or to the comptroller. It is not the expression of an opinion or a belief, but the statement of a positive fact.

If the contention of the directors be accepted as the true measure of their liability, their statements and representations would mean merely this:

I am one of the directors of the bank. I am a man of influence in the community. My name in the list of directors will bring business to the bank and thus increase the value of my stock. I am too busy to pay any attention to the conduct of the affairs of the bank, and too ignorant to know anything about it if I tried, and have therefore abdicated that function to the cashier who says he is honest. The foregoing statement was prepared by a clerk who is employed by this cashier in whom I have confidence. I have never examined a book nor an asset of the bank; nor have I given its affairs a moment's time or attention except to aid in electing myself director from year to year and declaring dividends (out of depositors' money) which acts I have done with untireing fidelity. I really have not the slightest knowledge as to the correctness of this statement, but I believe it to be true and would be pleased to have everybody accept it as correct and accordingly deposit your money in the bank.

If such is a true purport of the statement, it ought to be expressed more clearly.

What would the comptroller say if he received a report with such a statement of the director?

It is folly to say that the report means anything less than the words "correct, attest" indicate, and it would be

ridiculous to say the statements were mere expressions of opinions made in good faith.

The statement is as much a representation that he knows the condition, as it is as to any other statement therein contained. When, therefore, he signs a statement which is not correct, he has knowingly made a misrepresentation because he has said he knew, when in truth he knew he did not know. In other words, he makes a statement claiming to know it to be true, but in fact, he knows he has no knowledge whatever concerning it.

Viewed as a common-law action of deceit the decision of the Supreme Court of Nebraska is not erroneous.

True, it is held in the syllabus, that "it is no defense to an action of that character that such reports were made and published by the officers without knowledge of their falsity" (Jones Rec. p. 87). And the only other reference to that subject is contained on page 94 id. where Albert, commissioner, says:

"We do not wish to be understood to say that all of the defendants knew that such statements were false; we are satisfied that such is not the case. But, as was said in Gerner v. Mosher, 58 Neb. 135, **it was their duty to know whether the statements made by them were true, and the fact that they made and published them without knowledge of their falsity is no defense.**"

We submit this statement of the law is sustained both upon principle and authority, and would not merit a reversal even though it involved a federal question.

The use of the word "scienter" in the opinion in Gerner v. Mosher, 58 Neb. 135, was a mere obiter, and yet it does not contravene the true principle at the bottom of the liability in such cases.

To say on one hand there need be no actual knowledge, and on the other that there must be knowledge, but that this knowledge will be conclusively presumed to exist, when in fact it is conceded not to exist, involves a distinction too subtle for practical application.

Referring to the Nebraska cases, in 20 Cyc. 29, it was said:

"The decisions themselves are not inconsistent with the theory that the courts, when asserting that knowledge of the falsity is not essential, merely meant that where a person makes a positive assertion as of his own knowledge when in fact he is conscious that he has no knowledge on the subject, his liability is the same as though he knows his statement to be false."

On page 4 of Mr. Rose's brief, he says:

"Thus, the state court, while exercising authority upon the **assumption that the National Banking Act, by its own terms** (Sec. 5239 Rev. Stat. U. S.) **subjects bank directors to common-law liability for deceit,** declines to be bound by the limitations of the act which, **it is claimed,** adopts the common-law action, but in terms makes scienter an indispensable element."

An examination of the opinion of the state court will reveal that counsel misapprehends the principles upon which it is based. It does not assume that the federal statute either created or modified the action of deceit, but on the contrary, that it left it as it was at the common-law.

Perhaps mention should be made of Derry v. Peek, 14 App. Cas. 337, relied upon by plaintiffs in error as an authority in support of their contention.

The force of its authority, if it ever had any, is no longer recognized either in England or the United States.

The following quotation from 10 Cyc. 844 note, we think effectively disposes of that case:

"The decision of the house of lords in the celebrated case of Derry v. Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33, which allowed directors to substitute their own belief in the place of their knowledge in putting forth prospectuses concerning their company, and escape liability to their dupes, although their belief was ill-founded, provided it was bona fide, tended to let down the commercial morality of England to a deplorable extent, and was met with a storm of dissent on the part of the profession and the public. It was severely criticised by Sir Frederick Pollock, in the Law Quarterly Review of October, 1889; and unfavorable comments upon it will be found in 5 Law Quart. Rev. 410; 6 Law Quart. Rev. 72; 6 Law Quart. Rev. 112; 7 Law Quart. Rev. 106. But the rule which it established was subsequently abrogated by act of parliament. Directors' Liability Act 1890; L. J. Stat. 403, L. R. Stat. 516, set out in full in 2 Thompson Corp. Section 1466."

II. SECTION 5239 REVISED STATUTES U. S. NEITHER ABROGATES NOR MODIFIES THE COMMON-LAW ACTION OF DECEIT.

Section 5239, supra, is as follows:

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in case of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other

person, shall have sustained in consequence of such violation."

This is the section upon which plaintiffs in error rely as having cut down the common-law action of deceit.

We submit, however, that it will not admit of such a construction.

"When a right is given by statute and a specific remedy provided, or a new power and also the means of executing it are therein granted, the power can be executed and the right vindicated in no other way than that prescribed by the act. This rule does not conflict with the general rule that the jurisdiction of a court is not impaired by statutes conferring upon other tribunals, jurisdiction of the same kind and to reach the same redress, unless the statute expressly take away the former jurisdiction; nor with the other well-settled rule, that if a statute gives a remedy in the affirmative without a negative, express or implied, for a matter which was actionable at common-law, the party may sue at the common-law as well as upon the statute; for this does not take away the common-law remedy. * * * Statutes affirmative of the right, and prescribing other than the usual remedies for its enforcement, or conferring cognizance of it upon other tribunals, not negativing the pre-existing remedies or jurisdiction, in their very nature are merely cumulative, and not exclusive. * * * Where a statute gives a new remedy for a right existing and enforcible either at common-law or in equity, and contains no negative, express or implied, of the old remedy, the new one provided by it is cumulative, and the party may elect between the two."

Sutherland on Statutory Construction, Section 399, 1st. Ed., or Section 572, 2nd Ed. See also Sedgwick on Construction of Stat. and Constitutional Law, 323.

Where the statute creates the right and the remedy, the statutory remedy must be followed, but, where the right existed at common-law and an additionaly statutory remedy is given, the latter is regarded as cumulative

People v. Craycroft, 2 Cal. 243; 56 Am. Dec. 331.

"Remedies are cumulative where the statute gives a remedy with a penalty, a previous common-law remedy existing."

Dygert v. Schenck, 23 Wend. 445; 35 Am. Dec. 575.

The Act of Congress requiring inspection of steam boats and a certificate does not impair the common-law right of action by persons injured.

Swarthout v. N. J. Steamboat Co., 48 N. Y. 209; 8 Am. Rep. 541.

Where the legislature fails to provide a remedy for an injury occasioned by public use, the injured party will be remitted to his common-law remedy.

Hooker v. New Haven & New Hampton Co., 14 Conn. 146; 36 Am. Dec. 477.

Where a statute gives a right and provides no remedy, the party may pursue any remedy of the common-law adapted to the nature of the wrong or injury.

Maple v. John, 42 W. Va. 30; 57 Am. St. 839.

"If a statute gives a remedy in the affirmative without containing any express or implied negative for a matter which was actionable at the common-law, this does not take away the common-law remedy. The statutory remedy will be regarded as concurrent. * * * A statutory remedy cannot be made exclusive by the legislature as against a party who has a right to redress under the constitution of the state, unless such statutory remedy is commensurate with the constitutional right and the remedies to which by force of the constitution, he was entitled for his protection."

Hickman v. City of Kansas, 120 Mo. 110; 41 Am. St. 684.

Statutory remedy to compel a bidder to take property is cumulative, and does not take away the common-law action to compel specific performance.

Dawson v. Miller, Admr. 20 Tex. 171; 70 Am. Dec. 380.

If a duty is imposed by statute and no remedy is given for its breach, the remedy is by the common-law procedure.

Birmingham M. R. Co. v. Parsons, 100 Ala. 662; 46 Am. St. 92.

A statutory liability without providing procedure for its enforcement can be enforced by any court having jurisdiction of the parties and the subject matter, even in another state, and it makes no difference whether the action is ex contractu or ex delicto. Northern Pacific Lumber Co. v. Lang, 28 Oreg., 246; 52 Am. St. 780.

"Where a new right is introduced by statute, the statutory remedy is the one to be pursued, but where there is a pre-existing right at common-law and an affirmative statute inflicts a new penalty, the law is otherwise."

Lang v. Scott, 1 Blackford, 405; 12 Am. Dec. 257.

"If a statute provide a remedy for a matter before actionable at common-law, the common-law remedy is not thereby divested."

Crittenden v. Wilson, 5 Cowen 165; 15 Am. Dec. 462 and note.

"Affirmative statute does not take away rights derived from the common-law."

Methodist Church v. Remington, 1 Watts, 218; 26 Am. Dec. 61.

"New remedy being given by statute does not take away the common-law remedy already existing."

Donnell v. Jones, et al, 13 Ala. 490; 48 Am. Dec. 59.

Solomon v. Bates, 118 N. C. 312; 24 N. E. 478, was an action identical with the one at bar, and it was therein held that Section 5239 creates neither an action for deceit, nor one for negligence or misfeasance in behalf of creditors.

In Barnes v. Swift, 3 Ohio N. P. 291 (1894) Judge Hunt in overruling the demurer to a petition in an action for deceit (almost identical with the petitions in these cases) alleged to have been practiced by the officials of a national bank, said:

"The remedy provided in Section 5239 of the Rev. St. of the United States cannot well be regarded as limiting the right of recovery at common law for fraudulent representations resulting in injury."

In King v. Pomeroy, 121 Fed. Rep. 287, it was held that while a remedy given by the act creating the right is ordinarily exclusive, a new remedy provided in a case in which the right and an appropriate remedy already existed is merely cumulative, and the injured party is at liberty to pursue either.

Flynn v. Third National Bank et al, 122 Mich. 642; 81 N. W. 572, was an action by a creditor of a **national bank** against its directors for injury done and loss sustained by the bank by the negligence and mismanagement of the bank and it was held that an **action might be sustained against the directors of a national bank for negligence and mismanagement** of its affairs, resulting in loss.

3 Thomp. Corp. Section 4113. "The liability of directors of national banks is unquestionably the same in substance under the provisions of the national banking act, as under the principles of the common law and of equity. * * * It has been held in one of the federal circuits, (Welles v. Graves, 41 Fed. Rep. 459) that if the right to forfeit the charter of a national bank for violations of law under the National Banking Act, is lost by lapse of time, the directors cannot be proceeded against individually for such violation; * * * but the decision seems to be a strange aberration for there does not appear to be any connection between the two things except that they are spoken of in the same sections of a statute."

That the remedies afforded by the National Banking Act are not exclusive, but that the common-law remedies exist and may be enforced in the state courts was expressly recognized in the recent case of **Guthrie v. Harkness, 199 U. S. 148**, decided Oct. 30, 1905. This was an application for a writ of mandamus to compel the directors of a national bank to permit the stockholder to examine the bank's books. It was insisted that this right was cut off by Section 5211 requiring reports to be made to the Comptroller, and Section 5240 providing for the examination of banks, and Section 5241 providing that such associations shall be subject to no visitorial powers other than those authorized by the National Banking Act or vested in courts of justice. But it was held by an unanimous court that "the common-law right of a stockholder, for proper purposes, and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member, is not restricted as to national banks" by any of the provisions of the National Banking Act.

Mr. Justice Day, delivering the opinion of the court, says:

"While the state has no power to enact legislation con-

travening the federal laws for the control of national banks, Congress has provided that, for actions against them at law or in equity, they shall be deemed citizens of the state in which they are located, and that in such cases the circuit and district courts of the United States shall have such jurisdiction only as they would have in cases between individual citizens of the same state. * * * If the stockholders had the legal right to enforce inspection, there is no room to question the authority of the state courts to enforce the right by granting the proper relief in a judicial proceeding."

In closing, he says:

Finding nothing in the Act of Congress limiting the common-law right of the shareholder, we think that, under the circumstances of this case, he was wrongfully denied an inspection of the books and accounts of the bank by its officers, and the judgment of the Supreme Court of Utah is affirmed."

Whittmore v. Bank, 134 U. S. 527; 10 Sup. Ct. 592, was an action commenced in the United States Circuit Court for the district of New Hampshire by a stockholder for himself and such others as might join, against the directors, cashier, and ex-director of a **national bank** at Manchester, N H., to compel them to pay money lost to the bank by reason of their illegal conduct, charging them with doing acts **"in doing which the directors** and officers **violated their duties and obligations to the bank's stockholders, and their acts were in violation of the charter of the bank and the laws of the United States."**

This court dismissed the bill for want of jurisdiction in the circuit court.

The syllabus is as follows:

"Under Act of Congress July 12, 1882, providing that the jurisdiction for suits by or against any association established

under any law providing for national banking associations, except suits between them and the United States, shall be the same as the jurisdiction for suits by or against banks not organized under any law of the United States, the circuit court of the United States has no jurisdiction of a suit by a stockholder of a national bank against the bank and its officers and directors, all of whom are residents of the same state, to compel collection of a note due the bank, and payment to the bank by the directors of sums lost by reason of their illegal conduct.

Nor is such jurisdiction conferred by Rev. St. of United States Section 5209 prescribing punishment for embezzlement or wilful misapplication of the funds or credits of a national banking association by its officers or directors; nor by Section 5239, providing for a suit by the comptroller of the currency to forfeit the franchises of national banks for the intentional violation by their directors of the law relating to national banks."

This clearly recognizes the existence of common-law rights and remedies as against the officers of a national bank which may be enforced in a state court. Had the cause of action been one created by the National Banking Act, the United States circuit court would have had jurisdiction.

It will be observed that in this case it was alleged that the acts were in violation of the laws of the United States, the language which it was held in Bailey v. Mosher, 63 Fed. Rep. 488, brought that action under the National Banking Act.

In ex parte Chetwood, 165 U. S. 443; 17 Sup. Ct. 385, it was held that:

"A stockholder of an insolvent national bank may bring a suit in a state court, in behalf of the bank and himself, as a representative stockholder, against the directors, to recover money alleged to have been lost through their negligence and breach of trust, when the bank's officers, the receiver, and

the comptroller of the currency have all refused to bring such a suit."

In Boyd v. Schneider, 131 Fed. Rep. 223, it was held that:

"The National Banking Act providing for the administration of the affairs of an insolvent national bank by a receiver appointed by the comptroller of the currency, does not prevent depositors of an insolvent bank from maintaining a suit against its directors for negligently permitting its officers to loan the bank's assets in violation of such act, constituting a breach of the bank's implied contract with such depositors, inherent in the contract of deposit that the bank would use such deposits and its other assets in conformity with the safeguards provided by law."

In the opinion, Grosscup, J., says (p. 226 and 227):

"The bill shows also, that the directors had knowledge of some of those violations of law such as the payment of dividends out of the capital stock, and the increase of loans in large amounts to the Calumet Co., after notice from the Comptroller; that such loans were contrary to law; and also that of all other violations of law they would have been advised had reasonable diligence on their part been exercised.

It seems clear to us, that on such a state of facts the directors are answerable in some kind of action directly to the persons to whom their duty ran; and that, to the extent that the depositors suffered loss therefor the right of action, whatever it may be, runs directly to the depositors as a class.

The question is not determined by whether the amount thus recovered might not become an asset of the bank; but whether aside from that, the depositors may enforce the liability as a right special to them—a right growing out of the contract of deposit, and not common therefore to stockholders and other creditors, not depositors.

Unless the National Banking Act cuts deep enough to cut out these individual rights of action, the depositors have, in some form, a right to bring action on the claim set forth."

The argument on behalf of plaintiffs in error is based upon the assumption that Section 5239 Rev. St. U. S. creates the common-law action for deceit, or a liability analogous thereto.

Thus on Page 2 of Mr. Rose's brief, we find this statement:

"If the court should be of opinion that the (federal) statute subjects directors to comon-law liabilities, and to common-law remedies for their enforcement, it is still obvious that Section 5239 Rev. St. U. S. **creating such liabilities,** in terms narrows and restricts their application to the wrongful acts of the directors done knowingly and wilfully.

This point, **if meritorious,** will, in the case of Mr. Thompson be fatal to the judgment of the state court, even if the general doctrine at its foundation—**that the case presents simply the common-law cause of deceit**—is approved."

The argument is specious because it assumes that Section 5239, supra, creates or modifies the common-law action of deceit, when in fact it neither creates nor modifies it. Assuming it did create a liability analogous to the common-law action of deceit, that would not destroy the common-law action. It would be simply creating a new liability, which, being cumulative, would leave the common-law remedy unmodified.

The words "knowing" and "wilful" ("wilful" does not appear in Section 5239) cannot be read into the common-law action of deceit. By their plain import, they apply only to the acts condemned by the National Banking Act.

But we insist it creates no such liability. The language of the section is that "in cases of **such violation,** every director who participated in, or assented to the same, shall be liable in his personal and individual capacity for all damages which the association, its shareholders, or any other persons, shall

have sustained in consequence of such violation,' and it is argued that the words "such violation" refer to the first paragraph of said section which provides that he "shall knowingly violate," etc. Assuming this to be the correct construction, the statute affords no relief for the injury these depositors have sustained.

Section 5239, supra, creates a cause of action, only in case the directors "knowingly * * * violate any of the provisions of this Title" (Title LXII—National Banks) and you will search in vain for any provision making it an offense for, or prohibiting a director from making a false report of the bank's condition to a depositor—(or in fact anyone).

Section 5209 Rev. St. U. S. is the only one containing a suggestion in that direction, and it does not make it unlawful for a director to make or publish false reports of the bank's financial condition.

This was expressly decided in Cochran v. United States, 157 U. S. 286; 15 Sup. Ct. 629, wherein Mr. Justice Brown, construing Section 5209, supra, says:

"But, under Section 5209, there is no penalty fixed to the association or its officers for making a false report, nor to the president or cashier for verifying such report. The penalty imposed by Section 5209 is affixed to the one who makes any false entry in any book, report, or statement of the association."

It follows, that if we are to rely upon Section 5239, supra, for our cause of action, we have none.

Let us assume a national bank becomes insolvent without fault on the part of the officers or directors; that the officers and directors, knowing of such insolvency, make a false statement of the bank's condition in a private communica-

tion to a prospective depositor, to induce him to deposit money in the bank. (We assume the case of a private communication so as to eliminate all reference to the National Banking Act.) **Can it be said the depositor has no redress?** Yet, plainly, the National Banking Act affords him no remedy.

We doubt if Congress has power to thus license national bank directors to deceive and defraud the public with impunity, although it should attempt by express enactment so to do.

Assuming again, that the federal statute creates a liability running direct to the depositors, for the deceit and fraud practiced upon them, how could the receiver maintain such an action?

Neither the bank, the shareholders, nor the creditors in general have suffered damages. How would such an asset be "ratably distributed" among all the creditors.

Suppose but one depositor out of a total of 1,000 has been thus deceived, must he pro-rate his recovery with the 999 who have not been deceived—hence suffered no damages?

That the National Banking Act is a "complete system" proves nothing, if admitted. The expression is used with reference to the bank, as an entity and its affairs. Used in any other sense the expression is incorrect, for it does not provide relief in many cases, but remits those affected to their common-law remedies.

We do not question the power of Congress to regulate national banks nor in so doing, to preclude state regulations or interferences, but we do contend that the regulations which Congress has imposed are not exclusive of the common-law.

That it was the intention of Congress that national banks

should be deemed the same as private citizens (except in a few specified cases) and should therefore be ame able to the common-law as well as the statutes of the various states when not in conflict with a federal law, is quite evident, for, by the Act of July 12, 1882, Chap. 290, Sec. 4, it provided that jurisdiction of national banks shall be the same as, and not other than, a state corporation (except in suits between the bank and the United States, its agents, etc.)

And again in the Act of August 12, 1888, Chap. 866, Sec. 4, wherein it provided that national banks for the purpose of all actions by or against them shall be deemed citizens of the state in which located.

Congress had no grave fears of state interference, but saw the justice of permitting ordinary actions to be tried where the parties to the suit reside.

The action of deceit is not an attempt by the state to regulate or interfere with the affairs of a national bank. It in no way interferes with the performance of its functions as contemplated by Congress.

The action is not against the bank at all, but **against the directors as individuals.** In fact, they may long since have ceased to be directors, when the suit was commenced.

Or, like these cases, the bank may have become insolvent, its charter revoked, its affairs wound up and the receiver discharged.

Or, they may never have been directors at all (de jure) but mere imposters. How can the action be said to interfere with the regulation of the bank, or the performance of its destined functions?

This action does not come within the principles announced in Easton v. Iowa, 188 U. S. 220-239, because in that case

the legislature of Iowa assumed directly to interfere with the operation of the bank while it was a going concern; nor with the principle announced in Davis v. Elmyra Savings Bank, 161 U. S. 275-290, because in that case the legislature sought to interfere with the operation of a bank and by attempting to give preference to safety bank depositors, came into direct conflict with the provisions of the National Banking Act requiring ratable distribution of the assets among creditors. These actions have nothing to do with the assets the bank. The receiver could not maintain it because the wrong complained of is one that did not injure the bank. If anything, it aided the bank, because, by means of false representations, the bank obtained large deposits of money.

The injury was not suffered in common with other depositors because perchance but one out of an entire thousand depositors may have suffered the injury of which we complain.

The fact is that only four out of the entire list of creditors of the Capital National Bank have ever obtained judgment against the directors of this bank in their individual capacities. The recovery could in no event ever become an asset, and was not within the purview of the National Banking Act providing for a ratable distribution of its assets among creditors. The act does not assume to legislate on this question, but leaves the depositors to their remedy at the common-law.

It could not have been the intent of Congress to grant an immunity to directors for any fraud they might commit against creditors of the bank. Yet, to concede the contention of plaintiffs in error, would result in the conclusion that the directors can in no event become liable to a depositor for fraud and deceit. This is apparent, **first**, because Section 5239 gives rise to no such liability, and **second**, if it be true

as contended that the cause of action is an asset of the bank and can only be recovered at the suit of the receiver, and then only for ratable distribution among all creditors, then this action would not lie, because the bank for whom the receiver sues, has suffered no injury, and, if there could be such a recovery, it would be giving practically all of the recovery to creditors who had no cause of action and were not entitled to any portion of the recovery because they had not been deceived.

We are cited to Briggs v. Spaulding, 141 U. S .132-173; 11 Sup. Ct. 924, in support of the proposition that the personal liability of directors is derived from the Act of Congress and that if the common-law remedies are available against directors in favor of "any other person" it is because of their adoption by Congress in Sec. 5239"; and, having been so adopted, these remedies are subject to the express limitations and restrictions placed upon them by the literal and precise terms of the act of adoption defining the precedent conditions of their availability," by which, of course, is meant that the act must be knowing and willful. If we correctly apprehend the purport of that decision, it holds quite the contrary. In the syllabus it is said:

"Since the National Banking Act is silent as to the time when, and method by which a director may resign, the common-law governs."

Thus recognizing the existence of the common-law remedies in the absence of any express provisions in the National Banking Act.

That action was a suit by the receiver of the First National Bank of Buffalo against the directors of the bank

in which it was sought to charge the directors for negligence and gross inattention in the affairs of the bank by reason of which it sustained damages. It will be observed the action was by the corporation against its own agents. **It was not charged that they knowingly violated any law, or were guilty of dishonesty, but that they did not diligently perform duties devolved upon them.**. Mr. Chief Justice Fuller, who delivered the majority opinion of the court, said (p. 146):

"Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act, although, if any director participated in, or assented to any violation of the law by the board, he would be individually liable. * * * It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them. * * * Indeed, it is frankly stated by counsel that 'although special provisions of the statute are quoted and relied upon, these do not create the cause of action, but merely furnish the standard of duty and the evidence of wrong doing'; and Section 556 Mor. Priv. Corp., is cited, which is to the effect that 'the liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation **is not created by force of the statutory prohibition.** The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common-law rule, which renders every agent liable who violates his authority to the damage of his principal.' * * *

The theory of this bill is that the defendants are liable, **not to stockholders nor to creditors, as such, but to the**

bank, for losses alleged to have occurred, because of their inattention. If particular stockholders or creditors have a cause of action against the defendants individually, it is not sought to be proceeded on here, and the disposition of the question arising thereon would depend upon different considerations." (bottom p. 149)

It appears that in this case the bank had been for 14 years run solely by its executive officers.

The Chief Justice places great stress upon the fact that in the case of one director he had leave of absence on account of ill health for one year. That in the case of another, when he accepted the position, it was understood he was not to take any active interest in the management of the bank but was merely to act in a sort of an advisory capacity "and that he accepted the position upon the understanding that he should occupy this relation." That as to another, he sold his stock and resigned as a director before the injury complained of was sustained. That as to another he accepted the position upon the assurance that it would not require much of his time, and that shortly after he became a director his wife became periously ill, and "through the extra strain put upon him, fell himself into such a physical and mental position as incapacitated him for properly attending to business."

After reviewing the circumstances and conditions under which these parties became directors, the learned Justice says:

'Would it not have been the exercise of an extraordinary degree of care if these defendants had insisted within the first 90 days, upon making such an examination?* * * The turning point, so far as Spaulding and Johnson are concerned (and we include with them Francis E. Coit) is

whether, under all the circumstances, they were guilty of negligence, producing any of the losses in question, not affirmatively, but because they did not prevent them. * * * Without reviewing the various decisions on this subject, we hold that the directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as mere figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong doing, if that ignorance was the **result of gross inattention**; but in this case we do not think these defendants fairly liable for not preventing loss by putting the bank into liquidation within 90 days after they became directors, and it is really to that the case becomes reduced at last." (p. 162 and p. 165)

It will thus be seen that the liability was predicated solely on the common-law and that the provisions of Sec. 5239 were evidently not considered material for no reference is made as to whether these acts were knowingly or wilfully committed, but whether, under the circumstances, there was gross negligence and inattention.

This decision was by a divided court, Mr. Justice Harlan, Mr. Justice Gray, Mr. Justice Brewer and Mr. Justice Brown dissenting.

In the dissenting opinion Mr. Justice Harlan argues for a higher standard of duty and it seems to us with forcible argument and upon recognized authority.

Speaking of the manner in which these directors had performed their duties, he says: (p. 168)

"Upon this theory of duty, the only need for directors of a national bank is to meet, take the required oath to administer to its business diligently and honestly, turn over

all its affairs to the control of some one or more of its officers, and never go near the bank again unless they are notified to come there, or until they are informed that there is something wrong; and when it is ascertained that these officers, or some of them, while in full control, have embezzled or recklessly squandered the assets of the bank, the only comfort that swindled stockholders and depositors have is the assurance, not that the directors have themselves diligently administered the affairs of the bank, or diligently supervised the conduct of those to whom its affairs were committed, but that they had confidence in the integrity and fidelity of its officers and agents, and relied upon their assurance that all was right. No bank can be safely administered in that way. Such a system cannot be properly characterized otherwise than a farce. It cannot be tolerated without peril to the business interests of the country.

"We are of the opinion that when the act of congress declared that the affairs of a national banking association shall be 'managed' by its directors, and that the directors should take an oath to 'diligently and honestly administer' them, it was not intended that they should abdicate their functions, and leave its management and the administration of its affairs entirely to executive officers. True, the bank may act by 'duly authorized officers of agents' in respect to matters of current business and detail that may be properly entrusted to them by the directors, but certainly congress never contemplated that the duty of the directors to manage and to administer the affairs of a national bank should be in abeyance all-together during any period that particular officers and agents of the association are authorized or permitted by the directors to have full control of its affairs. If the directors of a national bank choose to invest its officers or agents with such control, what the latter do may bind the bank as between it and those dealing with such officers and agents, **but the duty remains, as between the directors and those who are interested in the banks to exercise proper diligence and supervision in respect to what may be done by its officers and agents.** * * *

The case is one of supine, continuous negligence upon the part of the three directors named, in the discharge of

duties they owed to the bank and to those interested in it. No usage of a national bank, nor any authority to carry on its business through executive officers and agents, will relieve its directors from the duty imposed upon them by law of diligently managing and diligently administering its affairs, and actively supervising the conduct of its officers and agents. There was here no diligence, no supervision, but absolute inaction in respect to the affairs of the bank.* * * They ought not by accepting and holding the position of directors, give assurance to stockholders and depositors, whose interests have been committed to their control, that the bank is being safely and honestly managed, without doing what prudent men of business recognize as essential to make such an assurance of value. A banking corporation, publicly avowing that its business was to be wholly administered by executive officers, and that the directors would have nothing in fact to do with its management, would not long retain the confidence of stockholders and depositors; a fact which, of itself, shows that the abdication by directors of their duties and functions not only tends to defeat the object for the creation of such an institution, but puts in peril the interests of stockholders and depositors."

III. THE PETITIONS CHARGE THE COMMON-LAW ACTION OF DECEIT, AND ARE NOT BASED UPON VIOLATIONS OF THE NATIONAL BANKING ACT.

(Petition—Jones Record pp. 6-17)

Plaintiffs in error have quoted only such portions of the petitions as would tend to support their contention that they set forth actions for negligence and misfeasance. They have directed attention to immaterial allegations and mere matters of inducement, but omitted the real and substantial averments of the petitions.

The material allegations may be epitomized as follows:

That at the times therein mentioned the defendants acted as directors and officers of the Capital National Bank. (It was not alleged that they **were** directors, because it was sufficient if they acted as such.) That the Capital National Bank was a corporation duly organized, etc. (This was not material because they would have been equally liable had its organization been pretended merely.)

That acting as such directors and officers it became and was the duty of the defendants under the law, as well as the by-laws of the bank to actively and actually manage and superintend the business of the same. (The law here relied upon was the common-law.)

(The petition then states in detail some of the directors' duties, which it is unnecessary to repeat.)

That the defendants failed to perform such duties, by reason of which large loans were made to insolvent persons upon inadequate or no securiety, etc. (No specific loan is alleged, no specific charge is made against any of the defendants, nor is it alleged that the bank sustained losses by reason thereof.)

That the books were out of balance; that they allowed and permitted false balances to be made and carried on the books of the bank; that they permitted to be carried on the books of the bank, and permitted and caused to be published, statements and advertisements wherein they included as valuable, assets of the bank which were, in fact, worthless; that they permitted and continued from time to time to carry worthless notes and other assets as part of the valuable and available assets of the bank when they knew, or should by proper diligence and examination, have known the same to be wholly worthless and of no value,

and from time to time published, permitted, allowed and caused to be published to the public, and informed and represented to plaintiffs that such notes, bills reecivable, and other worthless assets were good and collectible and a part of the valuable assets of the bank, when, in truth and in fact, they knew and were in duty bound to know such statements and each and all of them to be false and utterly untrue.

That the resources of said bank were largely inflated and the liabilities thereof largely shrunken, and the published statements and advertisements of the bank did not show its true condition in that it showed the bank was in good sound financial condition, when it was in truth and in fact insolvent, **and that such insolvency resulted from the careless and negligent manner in which the defendants acting as such directors and officers managed and superintended the bank and its business, and all of which said facts and circumstances the defendants and each of them had full knowledge and it was the duty of each of them under the law to so know and inform themselves regarding the true condition of said bank.** (That portion emphasized is the allegation relied upon by plaintiffs in error as converting this action into one for negligence and misconduct, but it will be observed that it contains no allegation sufficiently specific to state a cause of action under Sec. 5239 Rev. St. U. S. It was merely alleged as going to the question of knowledge of the bank's condition and had particular reference to Walsh, Vice-President, who was not a director and had signed no reports.)

After said bank became insolvent, the defendants made, caused, allowed and permitted to be made, statements to

the plaintiffs and the public showing said bank to be solvent, its capital stock unimpaired and a surplus on hand and so continued to publish, cause, allow and permit to be published such statements showing it in the condition aforesaid until it was forced to close its doors on Jan. 21, 1893.

That while so insolvent they continued to pay semi-annual dividends of from 4 to 8%, and permitted said bank to continue business and receive deposits from plaintiffs and others, when they knew of such insolvency, or ought to have known, and could have known by the exercise of ordinary care in the discharge of their duties as directors or acting directors, and of which insolvency plaintiffs were ignorant.

That while said bank was insolvent as aforesaid, the defendants frequently and fraudulently caused and permitted advertisements and statements to be made and published in the Lincoln, Nebraska, daily and weekly papers, setting forth the solvency of said bank for the purpose of inducing plaintiffs and others and the public generally, to deposit and keep money in said bank, and the plaintiff, relying upon said published statements, as it had a right to do, deposited and loaned its money to said bank as hereinafter stated.

That if it had not been for such false statements, plaintiff would not have deposited and loaned any money to said bank as it continued to do from time to time; nor would it have allowed the same to remain therein, but on account of the false statements referred to aforesaid, it allowed the same to remain on deposit, when, but for said false

and untrue statements, it would have promptly withdrawn its loans and deposits before the failure of said bank, and that it was prevented from so doing by reason of said false and untrue statements aforesaid showing said bank to be in good, sound financial condition and solvent, when in truth and in fact, it was not in good, sound financial condition, but was wholly and utterly insolvent.

That on the 9th day of December, 1892, said bank being insolvent as aforesaid, the defendants, for the purpose of inducing the plaintiffs and others to do and continue business with, and to loan to and deposit money with said bank, made, caused, allowed, and permitted to be made a false statement of the condition of said bank and its resources and liabilities, which statement was thereto attached, marked Exhibit A, and which statement was made, caused, allowed, and permitted to be made by said defendants, acting as such directors and officers of said bank for the purpose of deceiving the plaintiffs and others, and to induce the plaintiffs and others to do and continue doing business with said bank as aforesaid, and said defendants, on said date caused, allowed and permitted said false statement to be published in the newspapers of general circulation in Lincoln, Nebraska.

That on December 28, 1886, the defendants and each of them, acting as such directors and officers for the purpose of deceiving the plaintiff and others, and for the purpose of inducing the plaintiffs and others to believe said bank sound, solid and solvent, and to induce plaintiffs and others to do business with said bank as aforesaid, made, caused, allowed and permitted to be made, a false statement of its resources and liabilities showing said bank to be sound,

solvent and prosperous, (a copy of which is attached as Exhibit B) and caused, allowed and permitted said statement to be published in various newspapers in general circulation in the City of Lincoln, Nebraska, etc., for the purpose of, and with the intent to induce this plaintiff and others to loan money to and deposit same in said bank, when in truth and in fact said bank was not in sound, solid, safe and solvent condition, but was wholly insolvent.

That on and between July 24, 1884, and Jan. 21, 1893, the defendants with the fraudulent intent and purpose aforesaid, during all of said time made, allowed, caused and permitted to be made at different intervals false statements of the condition of said bank as to its resources and liabilities as hereinbefore alleged with the intent and purpose of deceiving the plaintiff and others as aforesaid, and caused, acquiesced in, allowed and permitted said false statements and each of them severally to be published as aforesaid.

That said statements showed, and the defendants in each of them represented that the bank was in a thoroughly sound, safe and solvent condition and was doing a flourishing business and was in all respects a safe and secure institution with which to do business and a safe bank in which to make deposits and loans of money, and that such statements were prepared and published, and were caused, permitted and allowed to be prepared and published by the defendants for the purpose of making it appear to the plaintiff and others that the bank was sound, safe and solvent and thereby inducing this plaintiff and others to believe and rely on such statements aforesaid; that they and each of them were read and looked over by the plaintiff

and that plaintiff believed them to be true and correct statements of the condition and resources of said bank.

That during said period **defendants had conversations with the plaintiffs in which they represented the bank to be thoroughly safe and sound,** and plaintiffs allege that believing said published statements and advertisements aforesaid and **said verbal representations so made by defendants** to be true and believing them to be true and relying upon the same, the plaintiff loaned to and deposited with said bank the sums of money set forth in detail in the petition.

That **such statements so published and as verbally announced to plaintiffs were,** as the defendants each of them well knew, and were in duty bound to know, grossly exaggerated and wholly false and untrue and that the liabilities of said bank were in each of said statements grossly shrunken and understated and the resources inflated and exaggerated, as hereinbefore stated.

That whereas, said statements and advertisements and **verbal statements showed** said bank to be sound, solid and solvent and doing a flourishing and prosperous business, it was in fact unsafe, precarious, and insolvent and could not pay the money owing to plaintiff and others.

That the true condition of the bank was well known to defendants at the several times they made said statements and advertisements as published and as verbally made to plaintiff, but, notwithstanding they knew its unsafe, insolvent condition and had full access to its books and accounts, and were in a position to know, and it was their duty to know the true condition of the bank, and they, and each of them should and could have known its true

condition by the exercise of ordinary care in the discharge of their duties as directors and **acting as directors**, and they, and each of them wilfully, negligently and recklessly for the purpose, and with the intent aforesaid, made and caused, allowed and permitted to be published said false statements and advertisements and **verbal false statements** for the purpose of inducing plaintiff and others to do business with, make loans to, and deposit money in said bank.

The plaintiff's knowledge of the condition of the bank was derived wholly from said published and verbal statements and that, **had said statements so published and verbally made, set out and given the true condition of said bank,** it would have appeared, and would have been shown that the bank was not sound, solid and solvent, and that it was not a safe institution in which to do business, and the **plaintiffs would not have made said loans and deposits with said bank.**

That after making said loans and deposits, which were each and all made by plaintiff relying upon such statements and advertisements aforesaid, the bank suspended business and went into the hands of a receiver, and was then, and had been for many years prior thereto, and at the time of publishing said statements and making said verbal statements, insolvent and unable to meet its obligations and could not pay its debts and did not have the assets and resources that defendants represented it had, and that by reason thereof said bank could not pay, and did not pay this plaintiff any part of said sum of money except the sum specifically stated in petition, and that the remainder has been wholly lost to plaintiff by reason of the facts hereinbefore set forth.

That by reason of the facts above set forth, and the false and fraudulent statements, advertisements and representations of the defendants, the plaintiff has suffered damages in the sums specified in the petition.

We have quoted thus fully from the petition to show what a small and insignificant portion thereof has been quoted by plaintiffs in error, and that the actions were not predicated on official reports to the comptroller.

We insist it **contains all the essential elements of an action for deceit, and that it does not contain allegations sufficient to constitute an action for negligence and malfeasance in office, either under the common-law or under Sec. 5239 Rev. St. U. S.**

The allegations upon which they rely as constituting this action as one for violation of the provisions of Sec. 5239 is "that such insolvency resulted from the careless and negligent manner in which the defendants, acting as such directors and officers, managed and superintended the bank and its assets."

That the allegations contained in these petitions indicating malfeasance and misconduct in office are too indefinite to constitute a cause of action under Sec. 5239 was decided in Allen v. Luke, 141 Fed. 694.

That was a suit against directors for misconduct, etc., and it was held that the bill "should set out with particularity the acts of defendants relied on to constitute negligence or misoncduct, and the details of the several transactions should be given with such fullness as can be done by a complainant" (p. 697).

As was said in that case, "Does complainant rely on fail-

ure to attend meetings or joining in a particular vote. Defendant is entitled to a concrete statement?"

In that case the bill alleged (p. 697) "that the said directors utterly failed and neglected to perform their aforesaid official duties and each and every one of them, and that for a considerable period of time prior to said Nov. 13, 1902, as hereinbefore and hereinafter set forth, failed to give any adequate attention to the affairs of said bank and allowed the said bank to be improvidently and recklessly managed," and that the defendants "wholly failed and neglected to make personal examination into the conduct and management of its affairs and into the condition of its assets," and the court held that those allegations were too general to state a cause of action.

So far as the petitions are concerned, the existence or non-existence of a federal question in them must be determined by the averments of the petitions, and cannot, for that purpose be affected by the answer or any other pleading.

That a defendant may, by his answer, tender a federal question is conceded, but that cannot affect the nature of the action contained in the plaintiff's petition.

So must the petition control the nature of the action so far as the plaintiff is concerned, for he can introduce no evidence that does not sustain some allegation in the petition.

In these petitions there is not a hint of a possible federal question. Indeed, but for the use of the word "national" in the name of the bank, there would be nothing from which it could be inferred that the defendants were directors of a **national** rather than a **state bank.** The word

"national" is a part of the name of the bank and is not intended to indicate the nature of the corporation, much less the source of its creation, and the fact that Section 5243 Rev. St. U. S. provides a penalty for the use of the word "national" by any other than a national bank, is not conclusive because the bank might conclude to pay that penalty rather than forego the use of the name.

But however that may be, the use of the word "national" is of no controlling force, and does not impliedly tender or allege the statutes by virtue of which it became a corporation, so as to require the court to take notice of the federal character of the corporation.

Oregon Short Line & Un. Ry. Co. v. Skottowe, 162 U. S. 490; 16 Sup. Ct. 869.

Oregon Short Line & Un. Ry. Co. v. Skottowe, supra, was action brought in a state court against the Railroad Company for personal injuries alleged to have been caused by negligence of the defendant Company. It was contended that when the declaration alleged that the defendant Company was an incorporated Company, it thereby tendered or impliedly alleged the charter including all statutes and grants of power by virtue of which it acquired the right to become a corporation, and exercise corporate powers, and that when the plaintiff alleged that the defendant was a corporation duly organized, she was deemed to have alleged the entire legal history of the Company, and particularly the Acts of Congress creating the corporation which thereby entitled defendant to remove the case to the circuit court.

Discussing this question, Mr. Justice Shiras says:

"We think the unsoundness of the proposition relied upon by the plaintiff in error may be sufficiently shown by the very test which its counsel suggest, namely, what facts would it be necessary for the plaintiff to prove, to maintain her action? * * * To justify a recovery in such a case, it would not be necessary for the plaintiff to allege or to prove the extent and nature of the defendants' corporate powers. **The defendants' liability did not arise out of its grants of rights and privileges from the several territories, or from the United States. It grew out of its negligence and misconduct in the management of a railroad in the State of Oregon, into which state it is not pretended that it entered by reason of anything contained in any act of congress. * * Whether the defendant was a corporation de jure or de facto was, in a case like the present, of no importance."**

The principle therein announced applies precisely to this case.

The defendants' liability grew out of the acts of fraud committed by them, and not through the grant of any privilege in the National Banking Act.

If the word "national" were in itself sufficient to transform this action into one under the National Banking Act, then no action for deceit could ever be maintained against the director of a national bank for his official position could not be alleged without stating the name of the corporation.

The petitions do not allege that the defendants were directors of a national bank, nor that the duties referred to were imposed by a federal statute, nor that the defendants were in fact directors at all, but that they **"acted** as directors and officers of the Capital National Bank, a corporation, etc." and that **acting** as such directors and officers they did the things complained of.

Wh[illegible]as unnecessary to allege that the bank became insolvent by reason of the negligence of the defendants, it certainly cannot affect the nature of the action. To allege the bank's insolvency was necessary to state the cause of action. To go further and allege the cause of its insolvency may have been unnecessary, but it will not do to say, that if we were injured by misrepresentations as to the bank's solvency, the directors are liable in damages if they are not to blame for its insolvency, but not so, if it were wrecked through their dishonesty and mismanagement.

The petitions disclose clearly that they do not predicate the cause of action on negligence or mismanagement of the defendants, but on the false statements, because, by direct averments they say that **if it had not been for such false statements, they would not have deposited and loaned any money to the bank nor allowed the same to remain there, but on account of the false statements, they did deposit it and permitted it to remain, when but for said false and untrue statements they would have withdrawn their money and that they were prevented from doing so by reason of the false representations.**

The duty with which we charge the defendants was not predicated upon the statute, but based on the common-law. Unless they owed us this duty, and unless we had a right to rely upon it, we could have no action for deceit.

That duty was one at common-law. It required no statute, state or federal, and certainly none is declared upon in the petition.

Besides, the petition having been filed in a state court, if reference to any statute is to be assumed, it must be a state rather than a federal one.

It is elementary that the facts giving the federal courts jurisdiction must affirmatively appear from the plaintiff's own statement.

Hanford v. Davies, 163 U. S. 279; Tennessee v. Union Bank, 152 U. S. 454.

And where there is doubt as to the pleader's meaning, the averments will be resolved against, rather than for the claim of federal jurisdiction. Plant v. Harrison, 101 Fed. Rep. 307; Fitzgerald v. Mo. Pac. Ry Co., 45 Fed. Rep. 812.

Can it be said that this petition affirmatively shows the gravamen of plaintiffs' charges to be a violation of the National Banking Act? Or that the allegations are so free from doubt as to be applicable to federal statutes alone?

The truth of the matter is that the allegations of the petition complained of are merely introductory to and a part of the recital of **deceit** which constitutes the **real cause of action.**

Plaintiffs sought recovery, not because the defendants had violated the National Banking Act, nor that they had been guilty of any acts of negligence or misfeasance, but that they had defrauded them. And the method which they had pursued, was to permit the bank to become insolvent, to sanction and conceal the padding of its assets, and finally to give out false reports and statements of its financial condition. That some of these acts are prohibited in the National Banking Act may be true(though that does not appear from the petition) but they are not relied upon as such, but are alleged rather in that they are successive steps in the process by which the plaintiffs were fraudulently induced to deposit, and these other matters are re-

cited merely by way of explaining how the process began, and the fraud was perpetrated.

These allegations were pertinent with reference to the liability of Walsh, who was a defendant in these cases. He was Vice-President during the entire existence of the bank, but **was never a director and signed none of the reports.** It was plaintiff's contention that the bank was so obviously insolvent, its management so negligent and dishonest, its books so palpably false, that it would have been discovered by a man of ordinary prudence, whose duty it was to know. That Walsh was presumed to know of the reports that were published and that they were false, and hence that he was presumed to have participated in the false representations in the absence of proof to the contrary.

Verdict was returned against him, but the court rendered a judgment in his favor, notwithstanding the verdict. But this condition did not exist as to the remaining defendants, because they had each signed numerous statements.

As was said in Stuart v. Bank of Staplehurst, 57 Neb. 576:

"Some of the acts declared upon may have been violations of the National Banking Act, but they are not relied upon as such, nor was a remedy sought under said act."

The petition which the court was then construing was the original petition in this case.

The argument of plaintiffs in error assumes that this is an action for a violation of Sec. 5239, and that therefore the damages arising, constitute assets of the bank, and that such suit must be brought by the receiver.

Assuming that all suits for damages sustained by virtue

of Sec. 5239 must be brought by the receiver, how can it be contended that plaintiff's petition bases its cause of action on a violation of that section?

It is argued that no recovery can be had under that section, unless there has been a violation **knowingly** or **wilfully** made.

Let us assume that in this case the bank became insolvent without any fault whatever on the part of the directors, but that the only wrong committed lay in the fact that the directors in a private communication falsely represented the financial condition of the bank, by reason of which depositors were induced to place their money in the bank and thereby sustained loss and damages. Accepting the theory of plaintiffs in error as correct, they must concede that in the supposed case there has been no violation of any federal law because there has been no act of wrong-doing **wilfully** or **knowingly** made, yet can it be said that in such case a depositor would have no cause of action? The question is its own refutation.

If then, an action would lie on behalf of a depositor against a director who was innocent of the bank's insolvency, would it be just to say that because the director had also been the instrument of its insolvency, he should therefore not be liable in damages.

Here the cause of action never was and never could be an asset of the corporation. It grew wholly out of injury done the plaintiffs. Out of a thousand depositors they are perhaps the only ones who ever suffered as a result of these false reports and statements and the legal reparation for those injuries is their sole asset.

The contention of plaintiffs in error is, that this cause

of action is an asset of the bank to be ratably distributed among all creditors. Upon what theory can the law take the reparation for damages sustained by one depositor and pro-rate it among creditors who are not entitled to it? Unless a creditor was induced to deposit his money by a similar false representation he would have no cause of action.

Moreover, the injury of which we complain never could become an asset of the bank. The bank has not been injured in any way. If the allegations of fraud and deceit are true, the bank profited by the act of the directors, because, by means of these false statements the plaintiffs were induced to deposit their money, by reason of which the bank was directly benefited. How could the receiver sustain an action against the directors in an action of this nature?

Neither is it true that the effect of this action is to appropriate the assets of the corporation to the exclusion of other creditors. This action has nothing whatever to do with the corporation nor its assets. In fact, as shown by the record, the charter of the bank has been forfeited, the stock assessment provided for by the National Banking Act has been made and paid long ago, the bank's affairs settled and the receiver discharged. Hence the directors are not further liable to the corporation.

Plaintiffs in error complain that if these actions can be maintained it necessarily follows that every other creditor can recover for the same reasons. This is true only if they have been similarly defrauded. In answer to this suggestion we can not do better than repeat the language used in

Bartholomew v. Bentley, 15 Ohio, 659, quoted with approval in Prescott v. Haughey, 65 Fed. Rep. 657:

"It is first said that to allow bill holders, who have been defrauded, to sue the members of the company individually at law will produce endless litigation, and when applied the remedy cannot by any possibility do equal justice to all the creditors or to the members of the company.

"It may be that numerous suits will be prosecuted. * * * And yet the doctrine that because they have cheated thousands they are safer than they would be if only one man had suffered does not obtain in courts of justice. * * * Again, it is said the fund sought is a trust fund, and a bill in chancery is the proper remedy. There would be much propriety in the position, were it in point of fact true that a party who has been defrauded by another has no redress save out of the fund composed solely of the proceeds of the imposition. In that case strict equity might require that all those whose injuries had been the source of the fund should share equitably in it. But the rule that a person sustaining damage by fraudulent acts of another can only look to a particular fund of the wrong-doer for redress never existed anywhere."

Plaintiffs in error quote Justice Shaw in Smith v. Hurd, 12 Metcalf, 371, wherein he says:

"If this can be done, the policy of the National Banking Act, providing for a ratable distribution of all the assets among the various creditors, would be defeated, and the assets in the nature of such damage be wasted in fruitless and expensive litigation in the multiplicity of suits."

That language is not applicable to the facts in these cases, because as before shown, the cause of action of these depositors was never and could never have been an asset of the bank.

As well say, that directors shall not be liable in an action for libel, slander, or false imprisonment, because it might

affect their solvency and consequently their ability to respond to the bank in the event of an assessment on their stock. If they are to be absolved from liability for the commission of one tort, why not all!

As well say the criminal code of the State shall not apply to them because it might interfere with the operation of the bank.

Plaintiffs in error suggest that if these suits can be maintained it follows that the directors had the right to pay the plaintiffs the amount of their respective claims and could prefer these plaintiffs as favored creditors and give them the whole amount of their claims, even if it rendered the defendants unable to pay the claims of other similar creditors and that this would be a violation of Sec. 5242 prohibiting preference and Sec. 5236 requiring ratable distribution.

This contention might be tenable if our cause of action were an asset of the bank or grew out of a transaction that was an injury to the corporation, but neither of these assumptions are true.

Since the action is against the directors in their individual capacity, they stand in the same position as any individual who has committed a fraud. If he has cheated thousands and his means are not sufficient to compensate them all, it may be that those who come first will fare best, but this argument does not prove that he shall not be liable to any.

To place upon the petition the construction contended for by our adversaries, would lead to an absurdity, because it must be concluded that the pleader intended to state a cause of action he could not maintain, instead of one which he might sustain.

This court is asked to hold that the petition declares upon a violation of Sec. 5239, which the receiver alone can bring, and that therefore our petition states no cause of action; instead of holding that it charges an action for deceit which we may maintain.

If a pleading may be so interpreted as to set forth a good ground of action, that interpretation should be given in preference to one which would exclude such ground and lead only to an absurdity. Olcott v. Carroll, 39 N. Y. 436; Marshall v. Shafter, 32 Cal. 177; 4 Ency. P. & P. 762.

The comparison between this petition and the one in Bailey v. Mosher, 63 Fed. Rep. 488, will be discussed when we come to consider the question res judicata urged in the Bailey case.

To allege what were the duties of the directors under the law is a conclusion of law, which follows from the allegation that they were directors of a banking corporation, and need not to have been pleaded. Bell v. Scherer, 12 Neb. 409.

And mere conclusions of law in a pleading will be disregarded. Woodward v. State, ex rel Thomssen, 58 Nebr. 598.

Under the code, pleadings are to be liberally construed and, if with such construction, a petition states a cause of action against a defendant and in favor of the plaintiff, a demurrer thereto should not be sustained. Pefley v. Johnson, 30 Neb. 529.

"The very object of the new system of pleading is to enable the court to give judgment according to the facts stated and proved, without regard to the form used or to the legal conclusions adopted by the pleader." 4 Ency. P. & P. 557, and cases cited.

We think the language of Mr. Justice Shiras in Oregon Short Line & Un. Ry. Co. v. Scottowe, ubi supra, applicable to our petition.

That these petitions state merely the common-law action of deceit has long been the settled doctrine of Nebraska. Stuart v. Bank of Staplehurst, 57 Neb. 576; Gerner v. Mosher, 58 Neb. 135; Gerner v. Mosher, 61 Neb. 100.

In fact the petition in Stuart v. Bank of Staplehurst, supra, was the original petition in these cases. (Jones Record pp. 60-66.)

The identical petition was before the court in Bailey v. Mosher, 74 Fed. Rep 15, where these cases were then pending on removal.

Plaintiffs moved to remand them to the state court for the reason that the petitions did not raise a federal question.

The motion was sustained. Shiras, J., deciding that "an action against directors of a National Bank for damages for inducing the plaintiff, by false representations contained in the reports made by them in accordance with the statutes and the regulations of the comptroller of the currency, to loan money to the bank, which he lost through its insolvency, does not present a controversy arising under the constitution or laws of the United States, of which the federal courts have jurisdiction, either originally or by removal."

The same petitions as amended by interlineation (Jones Rec. pp. 8-144) were before the Circuit Court of Appeals in Jones v. Mosher, 107 Fed. Rep. 561.

Plaintiffs in error insist that that court did not hold that the petition as then amended by interlineation stated

the common-law action of deceit, but that the opinion of Thayer, J., was predicated solely on the theory that the right to removal had been waived. An examination of the opinion will disclose otherwise.

Among the questions involved in that decision was: (1) whether "the interlineation made on March 16, 1899, did not change the nature of the cause of action which was counted upon by the amended complaint," (p. 564), and (2) if "the second complaint differed from the first or original complaint as respects the cause of action stated therein,, (p. 565).

Of these propositions Thayer, J., delivering the opinion, says (p. 565):

"We have made a careful examination of the complaint as it stood both before and after it had been changed by interlineation, and such comparison has satisfied us beyond a reasonable doubt that such interlineations as were made by leave of court on March 16, 1899, were unimportant and effected no change in the cause of action."

It will be observed the petitions charge verbal representations.

While it is contended the evidence did not sustain these allegations, yet, for the purpose of construing the petition it should be assumed that every material allegation, well pleaded, was sustained by sufficient evidence.

All of the evidence is not contained in the printed bill of exception and this court will not review the testimony to ascertain if it is sufficient to sustain the verdict and judgment in the state court.

Such verbal statements were entirely outside of any requirement of the Banking Act, as was the card published

in the daily papers, (Bill of Ex. p. 25), yet, in themselves would have been sufficient to subject the directors to an action for fraud and deceit.

It is insisted that our petitions are substantially like the petition in Bailey v. Mosher, 63 Fed. 488; that the latter was held to charge malfeasance and misconduct in office in violation of Section 5239, and that therefore the state court erred in construing the former as setting forth an action for fraud and deceit.

If the alleged similarity be true, then it was the Federal and not the State court which erred.

An examination of the petition upon which the federal court based its decision will disclose that it contained several allegations that are not contained in the petitions in these cases, and that it was the very allegations that are now omitted, upon which the federal court based its construction. Thus it was alleged (Bill p. 258) that the bank "was duly organized and incorporated under and by virtue of the banking laws of the United States"; that the bank became insolvent and was taken possession of by the comptroller of the currency; that in compliance with the laws of the United States and upon order and direction of the comptroller they made statements as required by law to the comptroller of the currency; that in violation of the National Banking Act the defendants made the following excessive loans: E. W. Mosher, $109,000; Charles W. Mosher, $78,000; Richard C. Outcalt, $53,000, and paid dividends when there were no profits, the petition closing with the words that (Bill p 264) "by reason of the several violations of the Banking law as above set forth by the several defendants they have become

and are liable to this plaintiff for the damages he has sustained by reason of their said acts."

Speaking of this last averment, Caldwell, C. J., says, 63 Fed. 489:

"In view of the last averment of the petition it is difficult to perceive how the plaintiff can successfully maintain that his cause of action does not arise under a law of the United States. * * * (p. 490) The plaintiff was not bound to state the legal effect of the facts set out in his petition, but having done so, he cannot complain if his adversary, and the court accept and act upon his own theory. * * * If it were possible to spell out of the averments of this petition, taken separately or together, an action for deceit, **the court would be precluded from attaching that meaning to them by the positive statement contained in the petition itself that the action is grounded on the violations of the banking law therein set out.**"

Plaintiffs in error criticise the opinion of the state court in the cases at bar, in that in its construction of these petitions, it was controlled by averments of legal conclusions therein contained, but it will be observed that it is the opinion of Caldwell, C. J., and not Albert, commissioner, that is vulnerable to this criticism.

The Circuit Court of Appeals, as evidenced by its own opinion, based its construction of the petition upon the allegations that **the wrongs complained of were grounded on the violations of the National Banking Act,** and that they were precluded from spelling out an action for deceit **by reason of a positive statement of plaintiff to that effect.**

We think the language of Albert, Commissioner, in the opinion in these cases, very apt and cogent where, (Jones Rec. p. 91) after reviewing the opinion in Bailey v. Mosher, supra, he says:

"From the foregoing it is clear that the court proceeded upon the ground that the plaintiff, by those allegations of his petition, which are omitted from those in the cases at bar, had committed himself to the theory that his cause of action was one arising under the federal banking law for misfeasance, resulting in damage to the bank. This very allegation, it held, precluded it from 'spelling out' a cause of action for deceit. If those allegations are to be held of such importance when included in a petition, it seems to us that their omission, and the studied omission of direct reference to the federal banking law from the petitions in the cases at bar are equally significant. Besides, it was expressly held in Jones v. Mosher, et al, 107 Fed. 561, that the petition involved no federal question; consequently it presented no case arising under the federal banking law. **It, and the other petitions before us, do state a cause of action for deceit.** We know of no rule of pleading that would justify this court in assuming that the plaintiff intended to plead a cause of action which he could not maintain, so long as he has pleaded facts sufficient to constitute one which he could maintain."

This is the language upon which plaintiffs in error base their contention, that the state court, in construing the petitions in these cases, was controlled or governed by the legal conclusions of the pleader.

The opinion is most able and convincing and in itself an unanswerable argument to every contention of the plaintiffs in error.

It needs no defense at our hands.

IV. THE CASES WERE TRIED AS ACTIONS FOR FRAUD AND DECEIT, AND NOT FOR NEGLIGENCE OR MALFEASANCE IN OFFICE.

Instructions of the trial court. (Jones Rec. pp. 27-36.)

The contention that the trial court tried these cases as

being for negligence and mismanagement is not sustained by the record.

Defendants quotation from paragraph 5 of the trial courts instructions is not only a small portion of the Instruction, but is incorrectly punctuated, (after the word "recover" there should be a period instead of a semi-colon) and conveys an erroneous impression of its purport.

The paragraph taken as a whole shows that the trial court tried the cases on the theory that they were for fraud and deceit. We quote (Jones Rec. p. 29).

"Each of the several plaintiffs allege that the defendants mentioned in said several petitions were the officers and directors of the Capital National Bank, doing a banking business in the City of Lincoln, and that by reason of the statements made by such officers and published in the Nebraska State Journal, and the Evening Call, newspapers alleged to be published in Lincoln, of the condition of said bank and showing said bank to be in a solvent and prosperous condition, the said several plaintiffs were induced to, and did deposit the several sums of money above indicated to you, in said bank, relying upon said representations so published as to the solvent condition of said bank.

And the plaintiffs allege that statements of its condition showing the solvency and soundness of said bank were published at divers and sundry times from the year 1886, down to and including December 9, 1892.

And the plaintiffs severably allege in their several petitions that said statements as to the condition of said bank were at all times during said period wholly false and untrue, and that in fact and in truth said bank was not at any of said time or during said period solvent and in sound condition, but was in fact and in truth in an insolvent condition.

And the plaintiffs severally allege that the resources of said bank were stated in said several statements published by the said defendants grossly exaggerated, and inflated, and stated to be greater than in truth they were, and that the liabilities of said bank at all times was by said published reports made to appear less than said liabilities of said bank

really were, and that much of the nominal assets of said bank, such as its Bills Receivable and Stocks and Bonds were, while represented by said reports to be assets of value, in fact worthless and uncollectible, and of little or no value. And that its liabilities were much greater than was represented in said statements so published or permitted to be published by the said defendants.

That by reason of the worthlessness of said assets and by reason of the excess liabilities, and by reason of the mismanagement and inattention, and gross negligence of the defendants the said bank about the 21st day of January, 1893, suspended business, closed its doors and was taken possession of by a receiver. And that by reason of the premises the plaintiff lost the sums of money severally, at that time on deposit in said bank as hereinbefore set forth."

In paragraph 7 of its instruction, the court states the issue as follows:

"These allegations of the petitions and denials set forth in the answers constitute the issues to be tried in these cases. And the burden of proof is therefore upon the plaintiffs to show by a preponderance of the testimony the truth of the allegations contained in their several petitions.

In other words the burden is upon the plaintiffs severally to show that the defendants severally published or caused to be published or participated in the publication of statements of the condition of the Capital National Bank from time to time during its existence as by the plaintiffs severally alleged; to show that the plaintiffs each for himself, or itself, relied upon the truth of said statements of the condition of said bank, and to show that such statements were untrue, that is to say that said bank was insolvent, or that its assets were not truly stated, or that its liabilities were understated to such degree and extent as to impair its solvency."

Paragraph 8 showed that the court considered this no action for mismanagement. It recognizes the principle (as we allege in the petition) that although the bank was insolvent at all times, no matter whether through negligence or otherwise, that this would not entitle plaintiffs to recover,

but that in addition they must prove the elements of an action for deceit. We quote: (id. 30).

"The mere fact that a bank was insolvent at any time, or at all times, standing by itself, would not entitle the plaintiffs or any of them to recover. The mere fact that it was insolvent at any time or at all times, and that statements were published by the defendants or any of them which were essentially false, would not entitle the plaintiffs or any of them to recover. The plaintiffs, and each of them in addition to proving both the above propositions must in addition thereto prove by a preponderance of the testimony that such published statements of the condition of the bank came to their notice, and was relied upon by them, and that they acted in reliance upon them in making the loans to or deposits with said bank before they could recover from the defendants or either of them.

The mere fact, however, that other inducing causes operated together with the foregoing considerations such as the obtaining of a higher rate of interest would not render the defendants or any of them less liable, provided always that such plaintiffs had notice of and relied upon the truthfulness of the published reports."

Paragraph 17 is a clear and concise statement of the common-law duty of directors and refers to no duties imposed by federal statute.

Paragraph 16, quoted in brief of plaintiffs in error, applied solely to the defendant Walsh. It was our contention, to paraphrase the instruction of the court, that if the embezzlements, misappropriations or falsifications were of such great extent and of such long continuance as would upon reasonable examination challenge the attention of an ordinary prudent business man, then the jury would be justified in finding that the directors were charged with notice of such misappropriation or embezzlement or falsification.

As will be observed, the instruction deals solely with the

question of notice. It refers to such of the defendants as did not actually or actively participate in the misrepresentation, but who, by reason of their opportunity and their duty, might be held or assumed to have participated or acquiesced in the fraud.

The jury were not instructed to base a verdict upon any misappropriation or embezzlement, but were merely authorized to find that an officer (Walsh) had notice of what the bank was doing.

Upon the same theory the trial court gave instruction 1 requested by plaintiffs.

Under this instruction the jury returned a verdict against Walsh. He, however, filed a motion for judgment notwithstanding the verdict and the trial court, evidently not being satisfied with its instructions affecting him, sustained the motion and rendered judgment in his favor. These instructions are therefore out of these cases, as they applied solely to Walsh.

An examination of the instructions **requested by defendants and refused by the trial court** will show clearly that the trial court did not consider this a suit under the National Banking Act.

Those instructions, commencing with defendants No. 3, informed the jury that the **Capital National Bank was organized under the National Banking Act, and sought to instruct them as to the directors' duties and liabilities under that act. They would have been proper were these actions for negligence or mismanagement under the National Banking Act, but, being actions for deceit, they were refused by the court and properly so.**

Evidence.

The evidence in these cases is quite voluminous and no attempt will therefore be made at an exhaustive review.

An examination of the bill of exceptions will disclose that **these cases were tried as actions for fraud and deceit and not for malfeasance in office.**

Defendants complain because investigation was not confined to the alleged false statements of the defendants, but covers the history of the bank and its transactions long before the reports complained of, and because we have gone into the management of the old Marsh National Bank; have shown the making of bad investments, and have gone extensively into detail concerning the character of the banks assets; have shown the payment of dividends out of the capital stock when there were no profits, and the loaning of vast sums without security.

It will be observed that these cases were tried in 1902, whereas the statements upon which fraud was predicated were made from 1886 to 1892.

In order to sustain our cause of action, it was necessary to prove, not only the making and publication of the statements, but that those statements were false and did not truly state the bank's actual condition at the times they were made, and to show that at the very date stated in those reports the bank was insolvent.

Proof of its insolvency at the date of its failure, Jan. 21, 1893, was very simple, but this did not constitute legal proof that the bank was insolvent when defendants made the statement of Dec. 9, 1892, much less when they made the statement of Dec. 28, 1886, and those intervening. There would

be no presumption that this condition extended backward.

It would have been proper, no doubt, to have taken each of the eleven statements offered in evidence, and to have shown that, at its particular date, the bank was insolvent; but in an institution which had done the business of the Capital National Bank, with its hundreds of books and maze of figures, it would have required an endless time to have accomplished this task, if indeed, it could have been done at all, for some of the necessary books of the bank were missing, such as Bills Receivable Register and Journals. It would have been well nigh impossible, and at least most difficult, to prove the solvency or insolvency of the makers of Bills Receivable included in the bank's assets, at a date ten or fifteen years prior to the time of the trial.

As there were eleven published statements introduced in evidence, the trial of the cases, had it proceeded upon that theory, would have taken months instead of weeks. (Bill pp. 20 to 35).

Instead of pursuing this method, plaintiffs adopted the course of showing specific losses at certain dates and following these up by showing that no losses were ever charged off, on the books; and relied upon the presumption, that a condition shown to exist at a certain date, would be presumed to continue until the contrary was shown.

It was therefore shown that the Marsh National Bank grew out of what was known as Marsh Bros., Mosher & Company; that the business of this Company was principally the handling of the paper of the Marsh Harvester Company, The Marsh Binder & Manufacturing Company, and various concerns at Sycamore, Illinois, owned by the Marsh's, (Bill pp. 63).

It was shown that "the assets, liabilities and accounts of Marsh Bros., Mosher & Company were transferred to the books of the Marsh National Bank and because the assets and liabilities of the Marsh National Bank," (Bill pp. 345-346), with a purported capital stock of $100,000, but that no actual cash was paid in.

Among the assets thus transferred were Bills Receivable $248,029.93; Stocks and Bonds $30,540.00; Collection Account (overdrawn) $14,573.32.

Bills Receivable, $248,029.93, consisted of paper taken by the different Marsh concerns for farm machinery. The Marsh's and all of their companies went into bankruptcy in June, 1884, and their assets did not realize sufficient to pay preferred claims of laborers; general creditors receiving nothing. (Testimony of Carnes p. 306-307; Alden p. 314 of Bill).

Mr. Alden testified that a year or two prior to the failure, the bank held at least $200,000.00 of such paper, and Mr. Carnes testified that the assets of the Marsh Harvester company by way of commercial paper was poor; that most of it was given for the sale of a "low down binder" which proved a failure and the paper which came to his knowledge was not worth over 25 to 30 per cent. of its face value. (Bill p. 313).

Stocks and Bonds, $30,540.00. It was shown that of this amount, $30,000.00 consisted of stock in the Marsh Harvester Company, which was worthless. To secrete this loss the figures "30" were erased on the ledger, leaving the net amount of Stocks and Bonds $540.00 and the account Bills Receivable raised from $248,029.93 to $278,029.93 by erasing the figure "4" and substituting "7." The books of original

entry showed no transactions whatever whereby the bank parted with any Stocks, or received any Bills Receivable, hence, it was undoubtedly a loss.

The Collection Account $14,573.32 was unquestionably a fictitious asset because there could not be an overdrawn Collection Account if honestly kept. (Bill 72). This account was diminished $10,000.00 by the erasure of the figure "1" under dates of July 2, 3 and 5, 1883. (Bill p. 72 and 73) and the account of the Omaha National Bank raised the same amount; while no such entries appeared on the cash journal or other books of the bank.

It was shown that in 1884 the bank sustained a loss of $28,174.70 on account of Donnell, Lawson & Simpson, no part of which was ever paid. (Bill pp. 46 and 47), and that after their failure—from Oct. 14, 1884, to Aug. 13, 1885, notes of that concern to the amount of $59,063.68 were discounted by the Capital National Bank; whereas it was shown by the testimony, that no such notes were ever executed or paid, and in fact were forgeries. (Bill pp. 48 and 49).

It was shown that on Dec. 14, 1885, Bills of Exchange was charged with $29,968.00 and 9 notes of the Marsh's aggregating that identical amount indicated as paid, when in fact the Marsh's were insolvent in June 1884 and paid not a cent of their indebtedness.

It was shown that notes of the First National Bank of Hastings, $10,000.00, First National Bank of Kearney, $10,000.00, F. S. Johnson & Company, Milford, $9,968.00 were discounted by the bank and appeared as a part of its assets, when in fact no such notes were ever given by the purported makers. They also were forgeries. (Bill pp. 43 and 44).

It was shown that fictitious credits to the account of "Inter-

est Paid" were made amounting to $115,016.44, (Bill p. 80). The effect of these entries was to increase the apparent net earnings of the bank and afford a basis for declaring dividends.

It was shown that at different dates, certificates of deposit, purported to have been issued to J. E. Hill as follows:

Cert. No. 24452, $100,250.00 (Original Ex. 140).
Cert. No. 24927, $14,650.00 (Original Ex. 121).
Cert. No. 24941, $10,000.00 (Original Ex. 124.
Cert. No. 25097, $50,000.00 (Original Ex. 145).
Cert. No. 21379, $50,000.00 (Original Ex. 146).
Cert. No. 25636, $50,000.00 (Original Ex. 141).
Cert. No. 25861, $38,114.75 (Original Ex. 142).

and aggregating in amount, $263,014.75, were paid by the bank, when in fact nothing was deposited on account of them and the certificates themselves were fictitious and merely used to abstract that amount of money from the bank. (Bill pp. 300-305).

It was shown that in many cases large certificates of deposit were paid, purporting to have been issued for one amount, when the books of the bank indicated it had received a much lesser amount on account of the certificate so issued.

The following is a schedule showing such instances:

C No.	Payee				Bank Paid	Bank Received when issued
17969,	C. H. Willard, Tr.,	Ex. 1056,	Bill, page	199	$40, 000.00	.00
19272,	G. M. Bartlett,	Ex.	Bill, page	199	100,000.000	5.00
21379,	J. E. Hill, Tr.,	Ex. 146,	Bill, page	82–85	50,000.00	100.00
21386,	G. M. Bartlett, Tr.,	Ex.	Bill, page	199	50,000.00	5.00
23593,	J. E. Hill, Tr.,	Ex. 139,	Bill, page	85	40,000.00	100.00
24471,	D. B. Welch,	Ex. 115,	Bill, page	85	10,000.00	1.50
24574,	P. F. L. Ashton,	Ex. 111,	Bill, page	199–200	1,500.00	500.00
24653,	C. Hammond,	Ex. 109,	Bill, page	86	5,000.00	100.00
24707,	John A. T. Hibbs,	Ex. 113,	Bill, page	86	3,000.00	300.00
24806,	Cascius S. Weese,	Ex. 112,	Bill, page	86	2,100.00	100.00
24866,	Austin Humphrey,	Ex. 116,	Bill, page	86	4,500.00	500.00
24973,	J. E. Hill, Tr.,	Ex. 121,	Bill, page,	87	14,650.00	4,650.00
24941,	J. E. Hill, Tr.,	Ex. 124,	Bill, page	87	10,000.00	5,000.00
24981,	A. P. S. Stuart,	Ex. 119,	Bill, page	87	2,000.00	20.00
24986,	H. R. King,	Ex. 118,	Bill, page	87	7,000.00	1,000.00
25047,	J. E. Hill, Tr.,	Ex. 144,	Bill, page	87–88	37,975.00	975.00
25056,	Harper Notes,	Ex. 120,	Bill, page	88	7,000.00	1,000.00
25097,	J. E. Hill, Tr.,	Ex. 145,	Bill, page	88	50,000.00	50.00
25380,	Hattie E. Carson,	Ex. 126,	Bill, page	88	1,100.00	100.00
25636,	J. E. Hill, Tr.,	Ex. 141,	Bill, page	88	50,000.00	100.00
25691,	D. B. Welch,	Ex. 122,	Bill, page	88	10,00.000	100.00
25861,	J. E. Hill, Tr.,	Ex. 142,	Bill, page	88	38,114.75	114.75
25862,	J. E. Hill, Tr.,	Ex. 143,	Bill, page	89	37,114.75	114.75
25933,	Mayer Bros.,	Ex. 114,	Bill, page	89	11,000.00	1,000.00
26818,	1st Nat. Bank Poultney,	Ex.	Bill, page	89–90	5,000.00	3.00
27401,	George Olcott,	Ex.	Bill, page	90	5,000.00	1.77
27978,	LaSalle National Bank,	Ex.	Bill, page	90	5,000.00	3.00
28009,	LaSalle National Bank,	Ex.	Bill, page	90	5,000 .00	3.00
					Total amount received by Bank.....	$15,946.77
					Total amount paid out by Bank.....	$602,054.56

In these transactions the bank sustained losses aggregating $586,107.73.

Certificate No| 24452 for $100,250.00 will illustrate how some of these transactions were manipulated. During the 1891 session of the Nebraska Legislature bonds were authorized issued for $100,000.00 to aid drouth sufferers. They sold at a premium of $250.00 and on April 24, 1891, the proceeds of the bonds amounting to $100,250.00 were deposited in the Capital National Bank and credited to the open account of the Nebraska Relief Fund. (Whitmore, Bill p. 97).

This amount was all checked out by the relief committee. (Bill p. 98), but on the same day the relief fund received this credit, a certificate of deposit (No. 24452) was issued for $100,250.00 payable to J. E. Hill, Tr. This certificate was fictitious and nothing was ever received by the bank on account of its issuance, yet the books of the bank show it to

have been paid April 28, 1891, (Bill p. 97). It would be interesting perhaps to follow the history of this certificate, but would throw no light on the issues involved in this court and unnecessarily extend a brief already too large.

It was shown that from Dec. 24, 1889, to Dec. 28, 1892, the books of the bank were out of balance $100,000.00 and that a balance was forced every day during that period of time, (Bill p. 99, 100 and 137).

It was shown that from July 24, 1888, to the failure of the bank, notes of the Western Manufacturing Company aggregating $755,000.00 (Bill p. 132) were discounted by the bank, when in fact that Company was a mere fiction and had no assets; in fact, did nothing but manufacture notes, and at the date of its failure, the bank had notes of this Company aggregating $235,000.00 on which not a cent was collected, (Bill pp. 109-111; also Bill pp. 315-8). This amount was nearly equal to the banks purported capital stock ($300,000) when the maximum loan to one person should not have exceeded $30,000.00.

It was shown that from Jan. 1885 to July 1892, the bank paid out in dividends $253,000.00 and charged to surplus $32,000.00 when in fact there never was a time when the bank had any profits or was even solvent. In fact, up to July 1, 1890, it had sustained losses and impairments aggregating $877,000.00, and up to July 1, 1891, had sustained losses and impairments aggregating $1,025,196.94. (Bill pp. 203-205). When in fact, never until Feb. 2, 1892, was there a cent charged off for losses or bad debts, and then only the sum of $30,000.00 (Bill p. 139), **charged off by order of the bank examiner (Bill p. 19)**.

The testimony was direct that at the date of every pub-

lished statement of its condition introduced in evidence, the bank was insolvent. (Bill p. 206), and, finally when it went into the hands of a receiver, Jan. 21, 1893, the bank's assets amounted to $180,494.52 with liabilities amounting to $1,761,062.38. The last published statement prior to this date was the one on Dec. 9, 1892, and, while it would not be exact to make a comparison between said date and the date of its failure, it is as near as we can get exact data as to the actual value of assets. A comparison of this report with the condition at the date of failure will give some idea of the magnitude of the deception and fraud, as its condition in January was, in all probability, not much worse than it had been the month preceeding.

This showed that by the report of Dec. 9, 1892, the bank had resources, total, $1,074,867.37, whereas the receiver realized on all assets of the bank $180,494.52, a difference of $894,372.85.

This same report showed its liabilities $1,074,867.37, while its actual indebtedness admitted by the receiver amounted to $1,761,062.38, a discrepancy of $686,195.01. (Dec. 1892 report, Bill p. 10-11. Testimony of McDonald, Receiver, Bill p. 324).

It was also shown that the bank carried an advertising card in the papers, in which was given the names of the officers and directors and the purported capital stock ($300,000.00). (Bill p. 25).

The evidence thus reviewed shows clearly upon what theory plaintiffs tried these cases.

Instead of having tried them as being grounded upon violations of the National Banking Act, plaintiffs always combatted that contention.

Thus during the trial, defendants sought repeatedly in cross-examination, to show that the published statements of the bank's condition were made on forms furnished by the Comptroller and in pursuance of his requirements. These questions were objected to and objection sustained on the ground that they were not material to the issue. (Bill pp. 135-137).

In the cross-examination of Mr. Whitmore (Bill p. 136) the following appears:

"Q. I will ask you whether these statements to which you have referred are made independently of the requirement of the Comptroller under the National Banking Act for the making of the same and the publication of the same in the newspapers as is required by the law governing national banks?

Mr. Thomas: The plaintiffs object as being an attempt to inject a federal question, and for the further reason that it is incompetent, irrelevant and immaterial, not proper cross-examination and asking for an opinion of the witness. Objection sustained."

So cross interrogatories concerning the bank's examination by the national bank examiner were objected to and sustained. (Bill pp. 134-136).

We are criticised for having introduced in evidence, the oaths of directors, but it will be recalled that Mr. Thompson denied having been a director when the deposits in question were made, and the oaths were offered for that reason.

Criticism is also offered for that we introduced in evidence the original reports made direct to the Comptroller, and it is argued from this, that our action was based on violations of the National Banking Act, but it is obvious that such was

not the purpose, for no liability was predicated on those reports.

It is well known that when the statement for the comptroller is prepared, another is also prepared for publication. After the latter has been published, verified proof of such publication is endorsed on it by the publisher and the statement and proof forwarded to the Comptroller, as evidence of the bank's compliance with the law.

In the cases at bar these published reports bearing proof of such publication, had been destroyed in accordance with a rule of the department. (Testimony of Major Lynch, Bill p. 3).

The defendants had denied signing, or authorizing the publication of the reports declared upon in our petition, and the reports to the Comptroller were corroborative evidence, (1) in that it represented the bank's condition to be the same as shown in the published statement, and (2), in that they were proof that the signers of the report must have been in Lincoln at the time they were made and knew of the report that was being published over their signatures.

Mr. Thompson.

Since special effort has been made on behalf of Mr. Thompson, we may be pardoned a brief reference to his testimony.

He says he always signed every report that was brought to him. Whenever he attended a directors' meeting and a report was handed him, he signed it.

When asked "Did you examine the assets of the bank to ascertain if the report correctly stated them?" he answered that he was always willing to sign any statement of the condition of the bank from the representations that were made

to him by the executive committee and the officers of the bank; and he justified it by explaining that he couldn't have told anything about it if he had examined the condition of the bank.

Q. You sign your name irrespective of the facts, you don't know what the true conditions are?

A. How could I do better?

Q. I simply want you to state this, that you are signing statements of the condition of that bank and are taking some one's else word entirely for the truth or falsity of the report?

A. That is what I am doing and I couldn't do different if I tried.

Q. And that is what you did with the Capital National Bank?

A. Yes, sir.

Q. And you didn't know at that time whether the report was true or false?

A. I couldn't have known.

Q. You didn't make any effort to find out except by asking someone else?

A. I am going to answer that question right or not at all.

Q. I have a right to an answer to that question by yes or no. You didn't make any effort to find out except by asking someone else? Can you answer that by yes or no?

A. That question cannot be answered by yes or no because I did not ask someone else. They made a regular written statement of the condition of the bank and it was from that that I knew the condition of it. (Bill pp. 230-1).

So it appears that he did not even inquire of anyone as to the correctness of the reports. This is the answer of the

"man of great capabilities and of the highest character for uprightness and probity, not only of local prominence but whose distinguished services for his country have advanced him in the diplomatic service to the rank of Ambassador" whose eulogy we find on page 57 of his separate brief.

This is the man who informs us that he has been at the head of some very large institutions in Nebraska. (Bill p. 230). Who, from 1884 to 1890 was Superintendent of the Burlington Railroad; who, in 1890, in addition to the line of nine hotels which he owned, took charge of the Lincoln Gas Company, The Lincoln Electric Company, and the Farmers & Merchants Insurance Company, as an active officer. (Bill pp. 223-224) and has been President of a Bank at Aurora since its organization in 1890. (Bill pp. 224 and 233).

Is it strange that the public would have confidence in a statement of the financial condition of a bank by so able a business man? Yet he signed these statements in utter ignorance as to their truth or falsity, relying solely on others and not even asking them, and pretends to justify his action by claiming that he was too ignorant to ascertain the falsity of these reports if he had attempted to, although he says: "I organized the Aurora State Bank in 1890 and have been its president ever since." (Bill p. 224).

He published these reports to the world as correct. The depositors of the bank had confidence in his ability and integrity. They believed that he had the ability to know that the statements he signed were true and the integrity to insure himself of their truthfulness before signing them. He has betrayed that confidence by certifying that **he knows a statement to be true, when, in fact, he knows that he**

knows nothing whatever as to its truthfulness, and could not know if he tried. He cannot even excuse himself under the plea that these reports were published under the order of the comptroller because he believed they were published as a matter of advertisement, to attract business and induce confiding patrons to deposit money in his bank.

We quote further from his testimony: (Bill p. 233).

Q. You knew these reports were published?

A. Well, sir, you may smile at my ignorance, but I never knew until you read that, that the comptroller required them to be published. I knew that the banks published them, but I thought it was for their own convenience.

Q. You thought it was just for the purpose of advertising?

A. I don't think I ever thought anything about it.

Q. You never knew before that the comptroller required these to be published?

A. No, sir.

Q. You thought it was just an act of the bank itself?

A. It would be a natural thing to do.

Q. You see banks right along every time a report is called for, publish their condition?

A. Yes, sir.

Q. And you notice these attested by the directors?

A. Yes, sir.

Q. And signed by some official of the bank?

A. Yes, sir.

Q. And yet you thought all this time that it was an act of the bank's itself?

A. I never thought anything about it, there has not been any reason why I should have given that any weighty

thought, my banking experience is nothing at all. Now while I have been president of this little bank up here at Aurora ever since its organization, if I went into that bank today and tried to tell from its books what the condition of the bank was, if my life depended on it, I couldn't do it.

Q. Notwithstanding, you are willing to sign your name to reports and let people believe them?

A. Let me tell you this, Mr. Lawyer, I don't know how many banks there are in this town, but I will just wager you a new hat, I'll just bet you that there are not three directors in this town that can tell you anything about their banks.

Q. You could tell if a column of figures was footed up right?

A. I might laboriously go through a column of figures.

Q. I suppose you could tell if a knife had been used on a book to scratch out figures?

A. Of course, I am not trying to protect myself from anything that legitimately belongs to be (me) to bear, but I am simply trying to tell you things that you already know, Mr. Thomas.

Q. I believe you said that you didn't know that the bank ever carried any paper of C. W. Mosher's?

A. It never came to my attention at all that Mr. Mosher had any paper in the bank, I never had any means of knowing it and I have no recollection of hearing anybody say that he had.

(At the time of its failure the bank had $85,281.67 of C. W. Mosher's notes (Bill p. 325) which were worthless, and $107,085.45 of E. W. Mosher's (Bill p. 325).

Q. And you didn't know they carried any paper of Outcalt's?

A. No, I never.

(Bank held $54,166.66 of Outcalt's notes (Bill p. 326).

Q. You didn't know that they carried any paper of the Western Manufacturing Company No. 1 of which Mr. Hurlbert was manager?

A. Well, no, and if I understand that thing, I question if anybody could have told, I understand that all those notes were carried by numbers there instead of in the name of anybody.

Q. You claim you didn't know that there was such paper in the bank?

A. I did not know it, no, sir.

($755,000.00 of these notes passed through the bank during a period of four year. (Bill pp. 132, 109, 111, 315-8.)

Q. You claim you did not know anything about this Relief Fund Certificate of Deposit?

A. All I know of that relief fund is that the legislature passed a law appropriating that much money and that Mosher was treasurer of that association. That is all I know.

Q. And you never inspected the books of the Capital National Bank yourself?

A. No, sir.

Q. Never looked at them for a moment in your life?

A. I don't think I ever looked at them at all; I know I never did.

Q. Never examined any of the accounts in there?

A. No.

Is this the extent of diligence the depositors of this bank had a right to expect from this eminent and able business

man? His sole diligence seemed to consist in assisting to declare dividends. (Bill p. 241.)

He thought the bank was doing a flourishing business, yet in 1891 sold his stock to Mr. Mosher (id. p. 242). He supposed at that time Mr. Mosher and Outcalt's notes for $150,000.00 would have been good without security, yet, notwithstanding they were reputed to be millionaires, he secured his sale of stock of the value of $22,500.00 with 350 shares of gas stock of the par value of $35,000.00.

He brands Mosher and Outcalt thieves (id. 230), and he would not be surprised at anything that Mosher might have done (id. 234); says he disposed of his stock on account of personal trouble with Mr. Mosher (id. 242), yet, on Dec. 27, 1892, (the bank failed Jan. 21, 1893) Mr. Mosher executes to him a mortgage on "two onyx top gilt tables, one mahogany table, I mahogany cabiet, 1 blue satin corner chair, 1 gold colored reception chair, 1 oval back red and gold easy chair, 1 large upholstered velvet trimmed lounge, and numerous other things of that character" (id. 243).

On Dec. 24, 1892, Mr. Outcalt, cashier, for a recited consideration of $12,500.00 executed to Mr. Thompson a chattel mortgage on about 29 head of horses, 5 carts, 1 light wagon, 100 tons of hay, 2,000 bushels oats, all harness, horse boots, 2 sulkies, located on his farm 5 miles south of Lincoln (printed record 249-50).

On Dec. 27, Mr. Mosher (president) executed to Mr. Thompson a chattel mortgage on his entire household goods, the items of which are too numerous for repetition but appear on pages 250, 1 and 2 of the record; also some buggies, harness, horses, etc. Both of these mortgages were filed for record Jan. 23, 1893.

Mr. Thompson claims he was not at home when these mortgages were given, but let us examine his testimony.

About the same time these mortgages were executed, Mosher and Outcalt deeded to Mr. Thompson ten or twelve tracts of land in Lancaster, Hamilton and York counties, (Bill pp. 244-5 and 6).

Q. Were you here when the real estate conveyances were made to you?

A. Yes, sir, but I did not think that ever there was any reason for going into that thing.

Q. As a matter of fact didn't Mosher deed to you the northwest quarter of 24-9-6, Lancaster county, and did you recite the consideration as $10,000.00?

A. You mean Outcalt?

Q. Yes.

A. Yes. * * * (Bill p. 244)

Q. And wasn't there a deed made to you conveying the northeast quarter of 12-12-5 in Hamilton county?

A. Yes, that was all one transaction.

Q. And one for the southwest quarter of 31-10-1 in York county?

A. Yes, sir.

Q. And another reconveying the title to the S. W. 31-10-1, York county?

A. I couldnt say the numbers you are reciting was right or wrong, but the whole transaction was as I have told you.

Q. How many pieces of land were included in that transaction?

A. I couldn't tell you.

* * * *

Q. About how many acres were there?

A. Oh, I couldn't tell you about that; there might have been five or six pieces of land, I don't know.

Q. And there might have been ten or twelve?

A. There might have been; I couldn't tell how many there were.

Q. You say when this deed from Outcalt was made December 29, 1892, you were in Lincoln?

A. No, I did not.

Q. Didn't you just testify to that a moment ago, that when the deed from Outcalt was made to you that you were in Lincoln?

A. I don't think so.

Q. Well what are the facts?

A. I said that was given me, that this stuff up here was given me a couple of months or such a matter before the failure of the bank in exchange for this gas stock.

Q. Isn't that deed dated, the deed to the N. W. 24-9-6, isn't it dated December 27, 1892?

A. Yes it was and I'll tell you why. When Mullen came to have that recorded he found that there was no date on it at all and I remember now of his telling me that he put a date on that. Now the date—I don't know what date he put on, but there was a date filled in because there was a date belonged there. * * *

Q. Well, did you record any of those deeds until after the failure of the bank?

A. No, I think Mullen recorded them all, sent them for record while I was away. (id. p. 245)

Q. While you were gone?

A. Yes, sir.

Q. After the bank failed?

A. No, I think this is what Mullen told me, when I came home, that Mosher had come over and told him that those deeds that I held ought to be recorded and I think he sent them up for record before the bank failed, on Mosher's telling him that they ought to be recorded.* * *

Q. Isn't it a fact that the deed to some Hamilton county land was recorded January 18th, 1893?

A. That might have been.

Q. And wasn't there a deed to the S. W. 31-10-1 in York county to you executed by Mosher filed for record January 14, 1893?

A. I don't hardly see how that could have been, and yet I would not say it wasn't.

Q. You were here on or about the 14th day of January, 1893?

A. That would be nine days before—I don't know that I wasn't.

Q. On that day didn't you make a deed to Mosher to the S. W. 31-10-1 in York county?

A. Yes, and I will tell you how that was done. * * *

Q. And on or about the 28th day of December, didn't Mosher and his wife, and Outcalt and his wife convey to you by deed the S. E. quarter and the south half of the northeast quarter of 19-11-2, also the southwest quarter of 13-12-2 in York county, which deed was recorded December 28, 1892?

A. Very likely that is right. * * *

Q. On January 12, 1893, you deeded to Mosher the southwest quarter of 13-12-2 in York county for a consideration of $1.00?

A. Very likely; it was a transfer of securities.

Q. And on January 7, 1893, Mosher and wife and Outcalt and wife, by deed conveyed to you the west half of the southeast quarter of 20-10-2 in York county for a recited consideration of $1,000.00 which was recorded January 14, 1893? (id. 246)

A. Very likely, it was all the same transaction.

Q. And on January 18, 1893, Mosher and wife by deed conveyed to you the northwest quarter of 19-21-1, York county, for $4,000.00 consideration?

A. Very likely, it was all the same transaction. * * *

Q. You testified that there was a date in one of those deeds that Mr. Mullen filled in?

A. There was a blank date.

Q. I will ask you if it wasnt in the chattel mortgage or the bills of sale?

A. I couldn't tell you about that, and I wouldn't pretend to say which one it was in, but I know he told me there was a blank in one.

Thus his own testimony shows that he was at Lincoln during the month or two preceding the failure of the bank.

He tells us how he was astonished when he learned of the bank's failure, and that he never had any intimation of it. (Bill p. 18)

What did he think of the letter of the Comptroller of the Currency under date of Sept. 8, 1891 (Bill p. 15) in which he states :

"The examiner reports that when your last report of condition was made to this office, you had overdrafts amounting to $55,004.47 as shown by your books, while you only reported $12,418.97, and classed the remainder as loans and discounts."

What did he think of the suggestion of the Comptroller that "**bad debts,** unless satisfactorily arranged in the meantime should be charged off prior to declaring a dividend," referring especially to an item of $14,000.00 (p. 15) or of the suggestion that premium account should be charged off as 4½ % U. S. bonds had no premium value on the market; or of the suggestion of the loss of $2,500.00 on the note of Donnell, Lawson & Simpson, which he claims was taken care of by Mr. Mosher in 1884, together with the $14,000.00 "bad debts" intended to be charged off before declaring a dividend.

Or what did he think of the further suggestion contained in this same letter (Bill 16): "The examiner reports that **your board of directors has held only two meetings during the past year, and there is no record of their having examined or approved of the loans and discounts. It is respectfully suggested that the conduct of the affairs of a national bank is by law devolved upon the board of directors and regular and frequent meetings are therefore very desirable,**" when, as he claims, he paid no attention to the affairs of the bank except to assist in declaring dividends.

Or the letter of Feb. 16, 1892, which is as follows. (Bill pp. 18-19):

"Treasury Department,
Office of the Comptroller of the Currency,
Washington, D. C., Feb. 16, 1892.

Mr. C. W. Mosher, President Capital Nat'l Bank, Lincoln, Neb.:

Sir: The report of an examination of your bank, made on the 26th ultimo, has been received.

The following loans appear to exceed the limit prescribed by Section 5200 U. S. R. S.:

E. W. Mosher.....$50,950.28
G. W. Small..... 51,752.53

The examiner reports that you have some loans that have been carried along for a number of years, which he thinks should be collected as soon as practicable, and includes the above excessive loans in this class. He also thinks that Mr. Mosher's liability as an endorser is too large.

The agreement of Messrs. R. C. Outcalt and C. W. Mosher to reduce their liabilities, and in future adjust all accounts so that overdrafts will be confined to those of a temporary nature, and also that they will close the bulk of their outside interests, and give their attention to the affairs of the bank, is received.

The examiner states that owing to these outside dealings the business of the bank has suffered.

Overdrafts are reported amounting to $60,936.78. Please inform me to what extent these have been reduced since the examination. The practice of allowing overdrafts should be avoided so far as practicable.

Overdue paper is reported amounting to $104,868.19, of which $14,500 is classed as "bad debts" as defined by Section 5204 U. S. R. S. Such of this overdue paper as is good should be collected or made active by renewal, with satisfactory security for payment after a reasonable extension.

The examiner reports that losses aggregating $30,000.00, including the amount of "bad debts" reported above, were charged off during the examination.

The examiner reports that your by-laws require the board of directors to meet only twice a year, and that they often only go through the form of declaring a dividend,

and do not examine the loans and discounts. He states that you have no discount nor examining committee.

It is respectfully suggested that the conduct of the affairs of a national bank is by law devolved upon the board of directors, and regular and frequent meetings are therefore very desirable.

It appears from the report that your bank was borrowing $137,234.16 on notes and bills rediscounted, and that it has been borrowing money continuously during the past year.

The examiner states that the amount of your borrowings have been largely reduced since his previous examination, and it is suggested that all this liability be paid off, and that the implied power to borrow money should be reserved for emergencies, and not habitually used for the purpose of procuring banking capital.

Ex. 948 P. 1.

The necessity for borrowing appears to have arisen from the excessive loans made, and your first effort should therefore be to realize on these by reducing them to the lawful limit. Special effort should also be made to collect or renew your overdue paper.

Please bring this communication to the attention of your board of directors for consideration, and for reply over their individual signatures.

C. Ex. 944.

E. S. LACEY,
Comptroller."

That these letters were received and read by the directors, see letter of E. P. Hamer, and one signed by all the directors; both directed to the Comptroller of the Currency (Bill p. 4-7).

Is it not significant that Mr. Thompson disposed of

nearly all of his stock November 14, 1891, (Bill p. 248) shortly after the Comptroller of the Currency criticised the condition of the bank, Sept. 8, 1891, (Bill pp. 15-16) and that he retained just enough stock to qualify him tc act as a director; thereby permitting his name to be used to lure confiding creditors into the meshes of the Capital National Bank?

Is it not significant that he should take a secured note from men whom he considered millionaires?

Is it not a circumstance of suspicion that he should be "swapping" securities with them within a month or two before the failure of the bank, when he still considered them millionaires?

Is it not strange that they, **his personal enemies,** should be thrusting upon him chattel mortgages and bills of sale of their household furniture and driving horses, and advising as to just the proper moment to record his unrecorded instruments, etc., within a short time preceding the banks failure, and never filed for record until after the bank closed its doors?

Why were they kept from the public records at all?

Mr. Thompson says he spurned the security and refused to accept it, but why was it given? Was it because the makers desired to favor a personal enemy, or did they pick upon Mr. Thompson as one most likely to assist them in getting this property out of the reach of their creditors? It at least indicates the existence of a peculiar relation, the true inwardness of which may never be known.

Mr. Thompson points to his loss as evidence of his good faith.

If this be proof, then Mosher and Outcalt are guiltless of

wrong doing, for they were bankrupted by its failure, whereas, before, they were reputed millionaires.

At the date of its failure the bank's liabilities exceeded its assets by **over a million and a half.** What became of this money? Neither Mr. Mosher nor Outcalt have it. The record shows that both of them had gone through bankruptcy several years prior to the trial of these cases. They owned no hotels, no banks, no insurance companies, electric light companies, nor were they negotiating for any gas plants.

The record does **not** disclose that Mr. Thompson has, as yet, availed himself of the benefits of the bankruptcy act.

We have not attempted a review of the entire testimony because it seems to use immaterial to the questions at issue, though, if space permitted, it would present the history of one of the most brazen and colossal frauds ever committed.

We have adverted specially to the testimony of Mr. Thompson because of the **novel** theory concerning **scienter** urged so eloquently in his brief. **Actual knowledge** can never be a matter of positive proof—it can only be inferred from established facts affording opportunity for knowledge—hence, from any view of the case, there was ample evidence to sustain a verdict, based upon the assumption of knowledge. And this, though we were to concede, that a false representation of a fact, made as within the personal knowledge of the maker, when he in fact has no such knowledge, is not knowingly false.

V. ALTHOUGH THE PETITIONS STATE MATTERS WHICH WOULD CONSTITUTE A CAUSE

OF ACTION UNDER THE NATIONAL BANKING ACT (WHICH WE DENY) THEY CLEARLY STATE A COMMON-LAW ACTION OF DECEIT, WHICH, BEING SUPPORTED BY THE EVIDENCE, IS SUFFICIENT TO SUSTAIN THE JUDGMENTS.

Assuming the petitions do contain a cause of action for negligence, they then contain two causes of action, one of which the state court has exclusive jurisdiction; the other raises a federal question. If defendants desired to have these causes separately stated and numbered they should have filed a motion to that effect, and having failed to do so they will be deemed to have waived it.

Exeter National Bank v. Orchard, 43 Neb. 581.

If a petition states facts sufficient to constitute an action for deceit, and is therein sustained by the evidence, the judgment will be sustained, although the petition also contains a federal question.

Thus in Hammond et al. v. Johnston et al., 142 U. S. 73; 12 Sup. Ct. Rep. 140, Mr. Chief Justice Fuller says:

"It is well settled that where the Supreme court of a state decides a federal question, and also decides against the plaintiff in error upon an independent ground not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

Again in Delaware City, etc., Nav. Co. v. Raybold, 142 U. S. 636, Mr. Justice Lamar says:

"The rule is well settled that, even if a federal question

was raised in the state court, yet if the case was decided on grounds broad enough in themselves to sustain the judgment without reference to the federal question, this court will not entertain jurisdiction. The authorities in support of this rule are too numerous for citation. We cite only a few of the more recent ones."

The justice cites numerous decisions sustaining this rule.

In Cook County v. Calumet & C. C. & D. Co., 138 U. S. 157; 11 Supt. Ct. Rep. 435, Mr. Chief Justice Fuller, delivering the opinion of the court, says:

"The rule is settled that, to give this court jurisdicition of a writ of error to a state court, it must affirmatively appear, not only that a federal question was presented for decision by the highest court of the state having jurisdiction but that its decision was necessary to the determination of the cause ,and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

De Saussure v. Gaillard, 127 U. S. 216; Johnson v. Risk, 137 U. S. 300.

In De Saussure v. Gaillard, supra, Mr. Justice Matthews says:

"It is a well settled rule, limiting the jurisdiction of this court in such cases, that 'where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the constitution, laws or treaties of the United States, or upon some other independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one.' Klinger v. Missouri, 13 Wall. 257, 263, per Mr. Justice Bradley. And it has been repeatedly decided under Section 709 of the Revised Statutes, that to give this court jurisdicition of a writ of error to a state court, it must appear affirma-

tively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it," citing numerous authorities.

This case was on a writ of error to the Supreme court of South Carolina, in which the state court had actually passed upon a federal question as will appear from the following quotation:

"It thus appears that in point of fact the Supreme court of the state of South Carolina, in its opinion in this case, passed upon the federal question sought to be raised by the plaintiff as the foundation of his case, and decided it adversely to him; but the analysis of the case which we have made shows clearly that the decision of that question was not necessary to the judgment."

Again in Hall v. Akers, 132 U. S. 554; 10 Sup. Ct. Rep. 171, Mr. Justice Blatchford, delivering the opinion of the court, says:

"In Murdock v. City of Memphis, 20 Wall. 590, 636, this court announced *** that, even assuming that a federal question was erroneously decided against the plaintiffs in error the court must further inquire whether there was any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question; and that if that is found to be the case the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue. This principle has since been repeatedly applied."

See also Eustis et al. v. Bolles et al., 150 U. S. 362; 14 Sup. Ct. Rep. 131; Kennebec, etc., R. R. Co. v. Portland, etc., R. R. Co., 14 Wall. 23; Rector v. Ashley 6 Wall. 142;

Gibson v. Chouteau, 8 Wall. 314; Klinger v. Missouri, 13 Wall. 257.

Can it be said of these cases (1) that it affirmatively appears in the pleadings or the record that a federal question is presented or involved, (2) that it is necessary to the determination of these cases, and (3) that the judgment of the District Court could not have been given without deciding a federal question? Yet all these must be answered in the affirmative in order to give this court jurisdiction.

This court will not review the decision of a state court in an action at law upon a pure question of fact, although a federal question would or would not be presented, according to the way in which the question of fact was decided.

Dower v. Richards, 151 U. S. 658.

This court cannot proceed, in reviewing a state court, upon general ideas of the requirements of natural justice apart from the provisions of the constitution supposed to be involved.

New York & N. E. R. R. Co. v. Bristol, 151 U. S. 556.

VI. THE DEFENDANTS HAVE BEEN DENIED NO TITLE, RIGHT, PRIVILEGE OR IMMUNITY CONFERRED BY THE CONSTITUTION, OR ANY STATUTE OR TREATY OF THE UNITED STATES.

If these cases are against the directors in their individual capacities, and if the federal statute does not destroy the common-law action of deecit, then it follows that they do not involve the construction of a federal statute.

The only theory upon wihch such a contention would be based is tnat Section 5239 creates an immunity on behalf of the directors and exempts them from liability in all cases except those specifically named in the National Banking Act.

That such is not the effect of that act we think too clear to require further argument.

To give this court jurisdiction in these cases it must appear that the construction of a federal statute was necessarily involved in the decision of the state court and that its decision was against the claim of some title, right, privilege or immunity thereunder.

VII. THE DECISION IN BAILEY V. MOSHER, (63 FED. 488) WAS NOT A BAR TO THIS ACTION.

It appears that on October 27, 1893, Thomas Bailey filed in the District Court of Lancaster county, Nebraska, his petition against all the defendants in these cases, except Mr. Thompson (Bill pp. 258-268).

The action was removed to the Federal Court, where defendants filed a demurrer to plaintiffs petition which was sustained by the court and the case dismissed.

The grounds of the demurrer are: (1) The court has no jurisdiction of the subject matter. (2) The plaintiff has no legal capacity to sue. (3) There is a defect of parties plaintiff. (4) The petition does not state facts sufficient to constittue a cause of action in favor of plaintiff and against defendants. (Bill p. 273)

It is difficult to see how any of the grounds for the demurrer could operate as an adjudication, for, (1) If the federal court had no jurisdiction of the subject matter, that

would not bar plaintiff from bringing his action in a court which had jurisdiction. (2) If the plaintiff had no legal capacity to maintain that cause of action, it would not bar him from bringing an action he might sustain. (3) If there was in that suit a defect of parties plaintiff, it would not bar the bringing of another suit in which were was no such defect, and (4) If that petition did not allege a cause of action in the plaintiff, it would not bar a subsequent suit in which the petition did state a cause of action.

To constitute a judgment at bar to a future action, it must have been on the merits:

"It is * * * necessary, in order to support a plea of res judicata, that the former judgment should have been rendered upon the merits of the controversy; the plea cannot be based upon a judgment founded upon a lack of jurisdiction, a non-joinder or misjoinder of parties plaintiff or defendant, a misconception of the form of pleading, a formal or technical defect in the pleading, or the like."

24 Am. & Eng. Enc. of Law, 2nd Ed., 794.

"A judgment upon a demurrer which is based upon formal or technical defects of a pleading, a lack of jurisdiction, a misjoinder of parties, or the like, as it does not involve the merits of the controversy, cannot be made available as res judicata." (id. pp. 798-9)

"The judgment must be upon the merits in a competent action, the plaintiff having sued in his proper character, and the pleadings having been correct. 'If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will must have been on the merits.

2 Black, Judgments, Section 693.

Again in discussing the meaning of the phrase "upon the merits," the same author says (Section 694):

"It is necessary that the ultimate right of action should have been in some way involved in the decision. **If the judgment goes off on an objection to the jurisdiction, or on a showing that the plaintiff has mistaken the from of action, or by reason of a defect of parties, or because the suit is premature, in any such case it needs no argument to show that the merits have not been reached.**. On the whole, then, we conclude that a judgment is 'upon the merits' when it amounts to a declaration of the law as to the respective rights and duties of the parties, based upon the ultimate fact or state of facts disclosed by the pleadings and evidence and upon which the right of recovery depends, irrespective of formal, technical, or dilatory objections or contentions."

Id. Section 699. "It is a settled and inflexible rule that a judgment of nonsuit is not a judgment upon the merits, and therefore it is no bar to another suit upon the same cause of action."

If the present petition states a cause of action for deceit, the judgment and opinion in Bailey v. Mosher, supra, cannot amount to a declaration of the law as to the respective rights and duties of Mr. Bailey and the defendants in this case. If such a judgment be a bar it follows that a litigant who mistakes his remedy thereby loses his cause of action. The law is not so harsh nor exacting as to mere matters of form or procedure.

"If to a petition or pleading in an action a general demurer is interposed, and the pleading is determined defective for the want of material allegation, and a judgment follows, and in a second suit the material averment which the pleading in the first suit lacked is supplied, constituting the pleading sufficient as a statement of a cause of action, the

judgment in the first case is not a bar to the second suit, though both were instituted to obtain the enforcement of the same right."

State v. Cornell, 52 Neb. 25.

For the purpose of determining the effect of this judgment as a bar we must adopt the construction of the petition given it by the court as a basis of its decision.

As construed by the circuit court of appeals the petition in Bailey v. Mosher, ubi supra, was an action for malfeasance and misconduct in office resulting in injury to the bank and predicated on Section 5239 of the National Banking Act.

In the opinion Caldwell, J., says:

"The petition states a single cause of action, founded wholly on the alleged misfeasance and nonfeasance of the deefndants in their capacities as officers and directors of a national bank. The alleged official misconduct of the defendants which is relied upon as stating the ground of action is particularly set out. It is alleged that they made false and misleading reports as to the condition of the bank to the Comptroller of the Currency; * * * that loans were made to persons in excess of the amount which could lawfully be loaned to anyone person; * * * that all these acts were violations of the National Banking Act, and of the duties of the defendants as officers and directors of the bank under that act, and the complaint concludes with the averment that, 'by reason of the several violations of the banking law as above set forth,' the defendants are liable to the plaintiff in the sum sued for. In view of the last averment of the petition it is difficult to perceive how the plaintiff can successfully maintain that his cause of action does not arise under a law of the United States. * * * (p. 491). The liability of the defendants, whatever it may be, for the acts complained of in the petition, is an asset of the bank belonging equally to all the creditors in proportion to their respective claims and cannot be appropriated, in whole or in part, by a single creditor to the

exclusive payment of his own claim. * * * Assuming that the defendants are liable in damages for the acts complained of in the petition, they are liable at the suit of the receiver, who is the statutory assignee of the bank, and the proper party to institute all suits for the recovery of the assets of the bank, of whatever nature, to the end that they may be ratably distributed among its creditors."

It was insisted by the plaintiff in error that the petition in that case did not declare upon a violation of the National Banking Act but was an action for fraud and deceit, but the court expressly declined to adopt this view, remarking:

"But it is said that the plaintiff is not suing as a creditor of the bank, or for its mismanagement, but for the fraud and deceit practiced upon him through the defendant's reports to the Comptroller of the Currency, by which he alone was damaged. As we have seen the form of the petition will not support this contention. The motion to remand was properly overruled, and the **demurer to the petition rightly sustained, upon the ground that the plaintiff is not the proper party to sue for the cause of action stated in the complaint as we construe it."**

What that case decided, then, was, that Bailey could not maintain his suit against the directors for malfeasance, in violation of Section 5239 Rev. St., resulting in injury to the bank, because that would be an asset of the bank recoverable only by the receiver.

The opinion conceded, at least impliedly, that had the petition as construed, set forth an action for fraud and deceit, the demurer would have been overruled and the case remanded.

It is therefore apparent that there is an entire lack of identity in the two causes of action. In order that a judgment in one suit may be a bar to recovery in another it

must appear that the facts upon which the two causes of action are predicated are the same; that proof in the one would be the same as proof in the other.

Applying this test to these two causes of action, it must be obvious that evidence that would sustain a charge of malfeasance and misconduct in office, resulting in injury to the bank, would be wholly foreign to an action for deceit; and that, on the contrary, evidence that would sustain a charge of fraud and deception, practiced on a depositor, would clearly constitute no proof of malfeasance resulting in injury to the bank. Or, to use a concrete illustration, false representations to induce one to deposit his mony in the bank might cause great injury to the depositor, although not injure the bank, while embezzlement, or improvident loans, might injuriously affect the bank (for which it could maintain suit) yet not affect the depositor (for he could not be affected unless the injury to the bank was sufficient to cause its insolvency.)

In its essence the case of Bailey v. Mosher decides that Bailey was not the proper party to sue the directors for malfeasance in office in violation of Section 5239 resulting in injury to the bank. So, after all, the question of res judicata reduces itself to this—does his petition in this case set forth the common-law action of deceit?

If it does, there is no bar.

Conclusion.

We ask the indulgence of the court for the length our brief has assumed. We have felt throughout the discussion, that these cases do not present a question of which this court will assume jurisdiction, but, yet, for fear our

zeal may have caused us to err, we have presented our contention as to the merits.

In view of the repeated decisions of this court recognizing the existence of the common-law remedies in cases of similar character, and in view, further, of its opinions, often expressed, as to the duties and responsibilities of directors, we have no fear that the judgment of the Supreme court of Nebraska will be held too exacting, or as having established too high a standard of morality.

Directors occupy a most exalted position in the commercial and financial world. That position is one peculiarly adapted to deception and fraud, because the public cannot know the real truth concerning the corporation, but must rely solely on its directors.

The stability of the institution is based upon faith and confidence in its directorate, and the degree of accountability should be commensurate with the responsibility.

The directors are the only visible representatives of the corporation. Through them alone does it exercise its corporation function—through them alone is it known to the business world.

Shall it be said they may abdicate this function—this duty to **actually** and **actively manage**—and become mere "gilded ornaments," maintained to attract confiding customers as the candle attracts the moth?

To concede this would be a sad commentary on the eithics of commerce and the justness of the law.

Respectfully submitted,

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W. B. C. BROWN,
Attorneys for Defendants in Error.

Seward, Nebr., Dec. 22, 1907.

Supreme Court of the United States.

No. 230.—October Term, 1906.

Charles E. Yates et al., Plaintiffs in Error, vs. Jones National Bank. } In error to the Supreme Court of the State of Nebraska.

[May 13, 1907.]

Mr. Justice White delivered the opinion of the Court.

This writ of error is prosecuted to secure the reversal of a judgment of the Supreme Court of the State of Nebraska affirming one entered by a court of Seward County, in that State, upon a verdict of a jury awarding damages against the defendants below, plaintiffs in error here, because of certain acts charged to have been done by them as officers and directors of the Capital National Bank of Lincoln, Nebraska.

We briefly summarize a statement contained in the opinion of the court below concerning a prior action between the same parties. That action, and three others of like character, brought by different plaintiffs, were begun in a county different from that in which the present one was commenced, and recovery was sought, with one exception, from those who were defendants below in this case, of the sum of a loss occasioned by the insolvency and suspension of the Capital National Bank, a corporation organized under the national-bank act. The actions referred to were removed into a Circuit Court of the United States, and in each a motion to remand was overruled, and in one of the cases (brought by Thomas Bailey) the Circuit Court sustained a demurrer to the petition and dismissed the cause, and the judgment so doing was affirmed by the Circuit Court of Appeals. (63 Fed. Rep. 488.) The plaintiffs in the other cases thereupon dismissed their actions and commenced new ones, as also did Bailey, in Seward County, of which the case before us is one. The same persons, who were impleaded in the prior actions, were made defendants, and in two of the actions one Thompson, a director of the bank, who had not been previously sued was joined as a defendant. The defendants were sought to be made liable for acts done as officers and directors of the Capital National Bank, although it was not expressly alleged that the bank was organized under the national bank act. Reliance in each action was placed upon alleged untrue written and oral statements and representations of the financial condition of the bank alleged to have been made and published by the

defendants, which were fully set out in various forms of expression, but in none of the averments was it specifically asserted that the acts in question were done in consequence of and in compliance with the provisions of the national bank act, although the exhibits attached to the petition disclosed the character of the written reports, which were in part relied upon. The State court overruled an application to remove, and a transcript of the record having been filed in the Circuit Court, on motion the action was, by that court, remanded to the State court, upon the ground that the petition was "clearly based, not upon the provisions of the national banking act, but upon the liability claimed to arise under the principles of the common law." See *Bailey* v. *Mosher*, (74 Fed. Rep. 15.)

An amended petition was filed, changing somewhat the averments originally made, and supplementing the same by new allegations. After a considerable lapse of time a second amended petition was filed. This latter enumerated many acts of negligence and mismanagement in the conduct of the affairs of the failed bank charged to have caused its insolvency, in addition to the averments which had been made in the original petition. The defendants demurred on the ground of want of jurisdiction, because the result of the pleading as amended was to demonstrate that the whole cause of action relied upon was based upon the violation by the defendants of provisions of the national bank act, and because under that act no cause of action in favor of the plaintiff was stated. The day the demurrer was filed the action was removed by the defendants in the Circuit Court of the United States. That court overruled a motion to remand, (see *Bailey* v. *Mosher*, 95 Fed. Rep. 223,) and subsequently the court sustained the demurrer and dismissed the action. Reviewing the action of the Circuit Court, however, the Circuit Court of Appeals held that in any event the removal had been made too late, "and that the judgment of the lower court dismissing the plaintiff's case was rendered without lawful jurisdiction over the case." (107 Fed. Rep. 561.) As a result the case went back to the State court, and in that court the demurrer to the second amended petition was argued and overruled.

There was judgment against Stuart, one of the defendants, for failure to answer the original petition, and this judgment was affirmed by the Supreme Court of Nebraska. (*Stuart* v. *Bank of Staplehurst*, 57 Neb. 570.) A separate answer to the second amended petition was filed on behalf of the defendant Thompson and a joint answer on behalf of the defendants Yates and Hamer. In the answer of Thompson it was averred that while a stockholder he was not a director of the Capital National Bank at the time the plaintiff made its various deposits; it was denied that any of the reports set out and referred to in the petition were signed or attested by Thompson, and specifically for himself he denied "all alleged misconduct

and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition."

The following paragraph was also set up in the answer:

"This defendant further says that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true, constitute a violation by this defendant as a director or stockholder, of his duties as such director or stockholder as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And this defendant alleges that if any liability attaches to him as a director or stockholder of said bank for any act done or duty neglected as set forth in said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of this defendant there is necessarily involved the construction of said national banking act relating to the duties of directors and stockholders of national banks. That a Federal question is involved in determining the liability of this defendant by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of this defendant."

Matter alleged to constitute an estoppel against the further prosecution of the action and to operate as a bar to recovery was set up in special defenses, which need not, however, be further noticed.

The answers of Yates and Hamer were similar in effect to that of Thompson, except as to the allegation that Thompson was not a director when the plaintiff made his deposits.

The cause was put at issue. Before the trial three of the defendants—Walsh, Hamer and Phillips—died, and the action was revived against the administrator of Walsh and Hamer, but was not prosecuted further against the estate of Phillips. The companion actions brought by different plaintiffs were tried with the case at bar by a jury, and there was verdict against all the defendants then before the court, upon which judgment was entered except as to the administrator of Walsh, in whose favor judgment was entered by the court upon special findings as to him made by the jury. After the correction of an error in the amount of the judgment the case was taken to the Supreme Court of Nebraska, where the judgment was affirmed. (105 N. W. 287.) This writ of error was then sued out apparently on behalf of all the defendants. We assume, however, that Charles W. Mosher and R. C. Outcalt, two of the defendants below, have abandoned the prosecution of the writ. We so assume because no cost bond appears to have been furnished by either; because neither have appeared at the bar by counsel and no brief in their behalf has been filed, and on the contrary—in the brief of the defendants in error it is stated that the persons named did not prosecute error, which we take to mean that the parties

referred to have abandoned in this court the prosecution of the writ of error which was sued out in their names, and because the bill of exceptions does not contain the answers of those defendants nor the evidence relating to their case, which would be pertinent to consider if we were called upon to determine whether prejudicial error was committed as to them. None of the remaining plaintiffs in error were officers of the bank and they were sued simply for acts done as directors thereof.

A motion to dismiss first requires attention. The asserted want of jurisdiction in this court is based upon the contention that no Federal question was raised in or decided by the State court. But, as will hereafter appear, the record plainly shows that both in the trial and appellate courts an immunity was claimed under section 5239 of the Revised Statutes, at least in respect to the rule of liability applied below, and such immunity was expressly denied by the State court, and there is, therefore, jurisdiction, even if in other respects jurisdiction might not be exercised, as to which we are not called upon to decide. (*Schlemmer* v. *Buffalo R. & P. R. Co.*, 205 U. S. ; *Tullock* v. *Mulvane*, 184 U. S. 497; *Metropolitan National Bank* v. *Claggett*, 141 U. S. 520; *Logan County National Bank* v. *Townsend*, 139 U. S. 67.)

To dispose of the controversy presented by the record before us we need only consider the following assignments of error:

"7. The court has erred in deciding that the fact that those plaintiffs in error who were directors were without knowledge of any falsity of the reports attested by them or some of them, mentioned in the petition, was immaterial, and that such directors or any of them were liable under the proofs showing they were without knowledge of the falsity of such reports; the said decision is in violation of the provisions of section 5239 of the Revised Statutes of the United States, which makes liability of the directors dependent upon the fact that they knowingly violated or knowingly permitted the violation of the provisions of the national banking act, and participated in or assented to such violation.

"8. The court has erred in deciding that a common law action of deceit based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by the directors of such bank can be maintained against such directors, without knowledge of any false statements in such reports, and without any participation in or assent to any violation of the national banking act as essential elements of the cause of action as required by section 5239 of the Revised Statutes of the United States."

The basis for these assignments is found, not only in instructions given by the trial court, but in refusals to give instructions asked by the defendants. The instructions given, which are pertinent to the assignments and which were duly excepted to below, read as follows:

"Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors may become liable for damages sustained by one de-

positing money in such bank in reliance upon the false representation of the condition of the bank contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue.

"The director of a bank who publishes or participates in the publication of a report of its condition by such act asserts that the statements contained in such report are substantially true, and he cannot rely upon his ignorance of the true condition of the bank as a defense to an action when he in such published reports represents the bank to be solvent, if in truth it is not solvent and its assets are fictitious or worthless or its liabilities so much greater than its assets as to render the bank insolvent.

"A director or executive of a national bank is responsible for the making and publication of a false report of its financial condition, though he did not personally make and publish such statement, if he in any manner participated in the making or publication thereof. A director of a national bank is presumed to know its true condition and that the law requires a true statement of its affairs to be made and published by the bank from time to time, and if one has been a director or executive officer of such a bank for a long period of time he is presumed to have knowledge of the making and publishing of the statements of its condition, and the burden is cast upon him to overcome this presumption by competent evidence.

"The jury are instructed that inasmuch as the law required that all reports made by a national bank to the Comptroller of the Currency shall be published at the expense of the bank, in a newspaper at the place where the bank is established, you have a right to consider such published reports as have been introduced in evidence in this action purporting to have been signed and whose names appear in such published reports as having been authorized by such defendants so appearing to have signed the same."

Of the instructions refused, to which exception was taken, we need only quote the following:

"The jury are instructed that if you find from the evidence introduced in reference to any one of the directors named in any one of the said cases that such director did not knowingly violate any of the requirements of the national banking act under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant."

Concerning the cause of action and the proof required to justify a recovery, the Supreme Court of Nebraska said:

"The petitions show misfeasance and mismanagement on the part of the defendants, as officers of the bank, and that the bank thereby sustained damages, but they show more than that. They show that the defendants made and published false and misleading statements concerning the financial condition of the bank, whereby the plaintiffs were induced to become and remain its creditors to their damage. In short, whatever other allegation may be contained in the petitions, they also contain sufficient to constitute a common law action for deceit. That the party, upon whom the

deceit or imposition was practiced by the officers of a national bank, may maintain an action against them in his own name and behalf for damages resulting to him therefrom, and that his right of action does not rest on the Federal statutes but the common law, is no longer an open question.

* * * * * *

"It was incumbent on the plaintiffs to establish by a preponderance of the evidence, (1) That the defendants published the statements purporting to show the financial condition of the Capital National Bank or participated in the publication thereof; (2) That such statements were false; (3) That the plaintiffs severally relied upon such statements and believed them to be true, and were thereby misled to their injury. As to the first proposition, the evidence shows that none of the statements were actually made by all of the defendants, but that each defendant participated in making some of them. It is urged on behalf of the defendant Thompson that he participated in making but one of them. That is a mistake; the evidence is conclusive that he signed and participated in making at least four of them, the first being that made and published December 28, 1886, the last that made and published July 9, 1891. The mistake arises, perhaps, from the construction which the defendants seem to place on the petitions. The petitions set out two of the statements at length, but it is also alleged that at divers other times and dates, between the 28th day of December, 1886, and the 21st day of January, 1893, the defendants made and published other false and misleading reports purporting to show the condition of the bank which were relied upon by the plaintiff. The defendants appear to take the position that the plaintiffs should be restricted to the two reports set out at length. We do not think so. The allegations of the petitions are sufficiently broad to admit proof of any and all statements made on and between the dates just mentioned. If definiteness and certainty required all such statements to be set out at length, the remedy was by motion."

It is not to be doubted that, although the plaintiff alleged the making of false verbal and written statements, there was no attempt to establish any verbal misrepresentations. It is also certain, even if it be conceded, *arguendo*, that there was some evidence tending to show the making of alleged written representations other than those contained in the official reports made by the association to the Comptroller of the Currency, and published in conformity to the national bank-act, that such latter statements were counted upon in the amended petition and were, if not exclusively, certainly principally, the grounds of the alleged false representations covered by the proof. Under this state of the record, irrespective of the nature and extent of the proof required to maintain an action of deceit at common law, the question is: Did the Supreme Court of Nebraska rightfully decide that the plaintiff was entitled to recover against the defendant directors upon proof merely of the following facts: "(1) That the defendants published the statements purporting to show the financial condition of the Capital National Bank or participated in the publication thereof; (2) That such statements were false; (3) That the plaintiffs

severally relied upon such statements and believed them to be true, and were thereby misled to their injury"? And the exact import of the propositions which were thus stated by the court below and were made the test of the right of the plaintiff to recover is plainly shown by an opinion of the Nebraska court cited in its opinion in this case, viz., *Gerner* v. *Mosher*, (58 Neb. 135,) which involved the liability of the directors of the very same national bank with whose failure this record is concerned. The court said:

"The defendants in the present suit, who, as directors, attested the reports made by the Capital National Bank to the Comptroller of the Currency, by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct, so far as the directors knew or had been advised by the proper performance of their duties as directors. The means of information, this record shows, were accessible to them. It was their duty to know whether the reports were correct or not.

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"In our view, whether the attesting directors possessed knowledge of the falsity of their reports is wholly immaterial. They were in fact false and untrue, and those who deposited money with the bank, or who purchased stock of the corporation, in reliance upon the truthfulness of the contents of those reports, were as much deceived and damaged thereby as though the directors when they signed the reports knew them to be false. That they were innocent of the true situation or condition of the affairs of the bank is wholly an unimportant consideration, since proof of a scienter is not necessary to a recovery. This court has frequently asserted that, to maintain an action for false representation, it is not essential that it be shown that they were intentionally or knowingly made by the defendant. This is the rule in ordinary causes, and no valid reason can be suggested or pointed out why the same principle should not apply in actions for deceit against the directors of a banking corporation. Certainly no case has come under our observation which has made an exception in their favor."

The proper solution of the question above propounded necessitates a consideration of the legislation of Congress respecting national banks.

By section 24 of the national bank act of February 25, 1863, (ch. 58, 12 Stat. 665, 671,) each association was required to make and forward to the Comptroller of the Currency quarterly reports, "containing a true statement of the condition of the association making such report," in respect to enumerated items, and it was provided that such report "shall be verified by the oath or affirmation of the president and cashier, and all willful false swearing in respect to such report shall be perjury, and subject to the punishment prescribed by law for such offense." It was made the duty of the Comptroller to publish full abstracts of such reports, as to specified items, in newspapers printed in the cities of Washington and New York, "and a separate report of each association" was required to be published,

at the expense of the association, in a newspaper published in the place where such association was established. Associations located in a number of the leading cities were also required to publish, in a newspaper published where the association was located, a statement, under the oath of the president or cashier, of the condition of the association, showing the average amount of loans and discounts, specie, deposits, and circulation. By section 45 the cashier of each association was required after each dividend to make, under oath, "a full, clear, and accurate statement of the condition of the association," enumerating specified particulars, which statement was to be forthwith transmitted to the Comptroller of the Currency. The national bank act of June 3, 1864 (ch. 106, 13 Stat. 109) substantially re-enacted, in a much condensed form, the requirements as to quarterly reports of the financial condition of each association. The abstract of such reports was required, however to be published by the Comptroller only in the city of Washington, and *every* association was required to make a monthly statement of its condition under the oath of the president or cashier. For each day after five days' delay in making a report each bank was made liable to a penalty of one hundred dollars. The act of 1864 did not contain a requirement for the making and transmittal to the Comptroller of a statement following the declaration of a dividend.

By an act approved March 3, 1869, (ch. 130, 15 Stat. 326,) in lieu of the reports required by the national bank act of 1864, it was made the duty of each association, on the requisition of the Comptroller, to make not less than five reports in each year. These reports were not only required to be verified "by the oath or affirmation of the president or cashier of such association," but to be "attested by the signature of at least three of the directors." Publication of such reports were required to be made in a newspaper published in the place where the association was established, and a penalty of one hundred dollars for each day's delay after a specified time in making and transmitting the report was authorized to be retained by the Treasurer of the United States out of interest due the association. Each association was also required to make a report, attested by the oath of its president or cashier, within ten days after the declaration of a dividend, stating the amount of each dividend and the amount of net earnings in excess of such dividends.

As embodied in the Revised Statutes the provision became section 5211, and is copied in the margin.*

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*Sec. 5211. Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association and attested by the signature of at least three of the directors.

By section 39 of the act of 1863, as well as by section 9 of the act of 1864, a director of a national bank was required, *inter alia*, as he is now required by section 5147 Rev. Stat., to "take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title." In the acts of 1863 and 1864 the concluding word used was not "Title," but "act."

Sections 50 and 52 of the act of 1863 (12 Stat. 679, 680) were practically identical, and sections 53 and 55 of the act of 1864 (13 Stat. 116) were also substantially alike, and by those sections civil and criminal liabilities were authorized to be assessed against and imposed upon directors of banking associations in certain contingencies. Section 52 of the act of 1863 and section 55 of the act of 1864—as supplemented by the act of April 6, 1869, (ch. 11, 16 Stat. 7,) construed in the act of July 8, 1880 (ch. 126, 16 Stat. 195) making it an offense to aid or abet an officer or agent of any association in doing the acts prohibited in section 55 of the act 1864, with intent to defraud or deceive—became section 5209 of the Revised Statutes. It is copied in the margin.†

Section 50 of the act of 1863 and section 53 of the act of 1864 became section 5239 of the Revised Statutes, reading as follows:

"SEC. 5239. If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own

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Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition.

† SEC. 5209. Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association, or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange,

name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

As in the early acts relating to the national banks, so in the sections of the Revised Statutes on the same subject there are many provisions specifically enjoining the doing or not doing of certain acts by the association or its officers. Thus by section 5137, Rev. Stat. (formerly section 28 of the act of 1864), a national bank is prohibited from acquiring real estate for purposes other than those specified in the act, and is forbidden to hold real estate, under certain contingencies, more than a specified length of time; by section 5200, Rev. Stat. (formerly section 29 of the act of 1864), it is prohibited to loan to any person or corporation in excess of one-tenth of the capital stock of a bank; by section 5201, Rev. Stat. (formerly section 35 of the act of 1864), banking associations are forbidden to loan or purchase their own stock; by section 5202, Rev. Stat. (formerly section 36 of the act of 1864), associations are forbidden to become indebted or become in any way liable exceeding the amount of their capital stock except on account of specified demands; by section 5203, Rev. Stat. (formerly section 37 of the act of 1864), a restriction is imposed upon the use of circulating notes; by section 5204, Rev. Stat. (formerly section 38 of the act of 1864), the withdrawal of the capital of an association while continuing its operations is forbidden either in the form of dividends or otherwise; and section 5206, Rev. Stat. (formerly section 39 of the act of 1864), embodies a restriction upon the use of notes of other banks. In addition to these sections of course may be considered the various sections enjoining the making and publishing of periodical reports of the association, to which we have heretofore referred.

It thus becomes obvious that the national-bank act imposes upon directors duties which would not rest upon them at common law, and that among such duties is the furnishing to the Comptroller of the Currency reports concerning the condition of the bank and the publication thereof. Although the statutory provisions subsequent to the act of 1863, relating

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mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

to the making and publishing of such reports, do not, as did the act of 1863, expressly require that the report when made should contain a "true" statement of the condition of the association, yet, by necessary implication, such is the character of the statement required to be made, and by the like implication the making and publishing of a false report is prohibited.

Considering the text of the national-bank act, as now embodied in the Revised Statutes, including section 5239, we think the latter section affords the exclusive rule by which to measure the right to recover damages from directors based upon a loss alleged to have resulted solely from the violation by such directors of a duty expressly imposed upon them by a provision of the act. By the first sentence of the section mentioned a forfeiture of the charter is entailed "if the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title . . ." And the last sentence ordains the rule by which civil liability is to be determined, by providing that "every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." As the section thus comprehends all the express commands to do or not to do, as to directors, contained in the national bank act, and besides specifies the nature of the conduct of directors from which their civil liability for violation of such commands may arise, it results that liability cannot be entailed upon them by exacting a different and higher standard of conduct as regards such commands than that established by the statute without depriving directors of an immunity conferred upon them. That the words "shall knowingly violate, or knowingly permit," &c., found in the first sentence of section 5239, Rev. Stat., were intended to express the rule of conduct which the statute established as a prerequisite to the liability of directors for a violation of the express provisions of the Title relating to national banks, is additionally shown by the oath which a director is required to take, wherein, as already stated, he swears "that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title." Mark the contrast between the general common law duty to "diligently and honestly administer the affairs of the association" and the distinct emphasis embodied in the promise not to "knowingly violate, or willingly permit to be violated, any of the provisions of this Title." In other words, as the statute does not relieve the directors from the common law duty to be honest and diligent, the oath exacted responds to such requirements. But as, on the other hand, the statute

imposes certain express duties and makes a knowing violation of such commands the test of civil liability, the oath in this regard also conforms to the requirements of the statute by the promise not to "knowingly violate, or willingly permit to be violated, any of the provisions of this Title."

And general considerations as to the spirit and intent of the national bank act (*Easton* v. *Iowa*, 188 U. S. 220; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275) also render necessary the conclusion that the measure of responsibility, concerning the violation by directors of express commands of the national-bank act, is in the nature of things exclusively governed by the specific provisions on the subject contained in that act. Thus a contrary conclusion would lead to a varying measure of responsibility, in the several States in which the question of liability might arise, depending upon the conceptions of the State courts of last resort as to the meaning of the act of Congress imposing the duty. Hence, it would follow that the same provision of the statute might mean one thing in one State and a different thing in another. The confusion which would result is aptly illustrated by a review made by the Supreme Court of Ohio in the recent case of *Mason* v. *Moore*, (73 Ohio St. 275,) of the conflicting State adjudications as to the proper rule to be applied to fix the liability of bank directors to third persons in an action of deceit at common law. The frustration of the public policy embodied in the national bank system, by the crippling of the usefulness of such institutions, which would result from holding that directors in performing the duties imposed upon them by the national bank act might be held liable civilly, not by the standard of conduct which the act provides for a violation of its express commands, but by another and different one is apparent. Under such a conception it might well be that prudent and responsible persons would decline to assume the discharge of the duties imposed by the statute because of the hazard of an uncertain pecuniary liability which the statute imposing the duty did not contemplate.

The civil liability of national bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the national-bank act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principle that where a statute creates a duty and prescribes a penalty for non-performance the rule prescribed in the statute is the exclusive test of liability. (*Farmers' & M. Nat. Bank* v. *Dearing*, 91 U. S. 29, 35, and cases cited.) The error in the decision below becomes at once apparent when its correctness is tested by the rule that the statute is applicable and prescribes the exclusive test of liability. The doctrine, as we

have seen, upon which the court below rested its judgment was that directors of a national bank who merely negligently participated in or assented to the making and publishing of an untrue official report of the condition of the bank were civilly liable to any one deceived to his injury by such report. Indeed, in one aspect, the ruling below went further than this, since it was, in substance, decided that despite the exercise of diligence by the director, if he attested an untrue report he was civilly liable because he did so at his risk, since it was his duty to know or to refrain from acting. That this imposed a higher standard of conduct than was required by the statute is obvious, but is clearly also established by previous decisions of this court, pointing out that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional. (*McDonald* v. *Williams*, 174 U. S. 397; *Potter* v. *United States*, 155 U. S. 438, 446, and cases cited.) See, also, *Utley* v. *Hill*, (155 Mo. 232, 264 *et seq.* and cases cited.)

Of course in what has been said we have confined ourselves to the precise question arising for decision, and therefore must not be understood as expressing an opinion as to whether and to what extent directors of national banks may be civilly liable by the principles of the common law for purely voluntary statements made to individuals or the public, embodying false representations as to the financial condition of the bank, by which one who has rightfully relied upon such representation has been damaged. And because we have applied in this case to the duty expressly imposed by the statute the standard of conduct established therein we must not be considered as expressing an opinion upon the correctness of the views enunciated by the court below concerning the standard which should be applied solely under the principles of the common law, to fix the civil liabilities of directors in an action of deceit. See *Briggs* v. *Spaulding*, (141 U. S. 132.)

There is a suggestion that the subject matter of this controversy is so inherently Federal that, although the judgments of the Circuit Court and of the Circuit Court of Appeals remanding the cause to the State court may not be re-examined, (25 Stat. 435,) nevertheless it should now be decided that the State court was wholly devoid of jurisdiction. This claim is predicated upon the provision of section 5239, Rev. Stat. conferring exclusive jurisdiction on courts of the United States to declare a forfeiture of the charter of a national bank as the result of wrongs committed by the directors, and the contention that a declaration of such forfeiture is a prerequisite to an action to enforce the civil liability of directors, and that such action could only be brought in the courts of the

United States after a forfeiture has been adjudged. We content ourselves with saying that we think these contentions are without merit.

It follows from what has been said that, as to Mosher and Outcalt, two of the persons named as plaintiffs in error in the writ and citation, the writ of error is dismissed for want of prosecution; as to the other plaintiffs in error, the judgment below is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

True copy.

Test:

Clerk Supreme Court U. S.

Supreme Court of the United States.

Nos. 231, 232 and 233.—October Term, 1906.

231	Charles E. Yates et al., Plaintiffs in Error, *vs.* Utica Bank.	In error to the Supreme Court of the State of Nebraska.
232	Charles E. Yates et al., Plaintiffs in Error, *vs.* Thomas Bailey.	
233	Charles E. Yates et al., Plaintiffs in Error, *vs.* Bank of Staplehurst.	

[May 13, 1907.]

Mr. Justice White delivered the opinion of the Court.

These are the actions referred to in the opinion just announced in No. 230, *Yates* v. *Jones National Bank*, as companion actions with that case and as having been tried with it. The issues raised below and the questions of law which here arise for decision are, therefore the same as in No. 230, and the reasons given in the opinion in that case require a reversal of the judgments in these.

In the Bailey case, (No. 232,) however, there is a question not presented in the others, which, if determined in favor of the plaintiffs in error in that case, will finally settle that particular controversy. Referring, therefore, to the opinion in the Jones National Bank case for the general grounds of reversal in the three cases, we come to consider the particular ground which is additionally relied upon in the Bailey case as establishing that the decree of reversal in that case should be made conclusive of the entire controversy.

By a "second defense," the defendants pleaded as *res adjudicata* a judgment asserted to have been rendered in their favor in an action brought by the same plaintiff in Lancaster County, Nebraska, which was removed into the Circuit Court of the United States where, upon the sustaining of a demurrer to the petition, a judgment of dismissal was entered which was by the Circuit Court of Appeals affirmed. (63 Fed. Rep. 488.)

Despite the introduction in evidence of the judgment roll in the case just referred to, which for convenience we term the Lancaster County

action, the jury in this case, over the objection and exception of the defendants, were in effect instructed that the judgment in the former action did not operate as a bar to a recovery in the present case. Each defendant, in a motion for a new trial, alleged the commission of error by the court in "failing to give full faith and credit" to the judgment of the Circuit Court of Appeals in the Lancaster County action. The Supreme Court of Nebraska considered the subject, and as its conclusion was that the judgment of the Circuit Court of Appeals was not *res adjudicata* of the issues in this cause it therefore decided that in refusing to give effect of *res adjudicata* to such judgment, the trial court had not wrongfully denied the validity of an authority exercised under the United States. The correctness of this conclusion is the particular question to be considered which as we have said distinguishes this case from the others.

Whilst the court below found that the Lancaster County action was between the same parties and in its opinion was based substantially upon the same facts as in the present action, it based its ruling denying the effect of *res adjudicata* to the prior judgment upon the conclusion that taking into view both the pleadings and the opinion in the previous action it must be considered as certain that the case involved a different cause of action from the one presented here. In so concluding we think the court was right.

The judgment relied upon was rendered upon a demurrer. This fact, however, does not affect the cogency of the judgment if otherwise efficacious to bring into play the presumption of the thing adjudged. *Northern Pacific Ry. Co.* v. *Slaght*, (205 U. S. 122, 133, and authorities there cited.) To determine whether the judgment in the former case was conclusive in this, in view of its uncertainty, we must address ourselves to the pleadings in that case and consider the opinion of the court for the purpose of ascertaining precisely what was concluded by the judgment upon the demurrer. (*Nat. F'dry &c.* v. *Oconto Water Supply Co.*, 183 U. S. 216, 234, and cases cited.) Coming to do so, we find that the demurrer was sustained on the ground that no cause of action in favor of the plaintiff was stated in the petition, because the Circuit Court of Appeals was of the opinion that the petition only stated a right to recover for violations of the national bank act, causing damage to the bank as such, the right to recover for which was an asset of the bank, enforceable only by its receiver. In so deciding the court expressly held that the averments in the petition relative to the fraud and deceit claimed to have been practiced upon the plaintiff through reports to the Comptroller of the Currency were mere matter of inducement or surplusage and did not constitute averments of a substantive cause of action. In other words, the previous case was decided exclusively upon the ground that as the plaintiff had not set up any individual wrong

suffered by him, but solely an injury sustained in common with all other creditors of the bank, the resulting damage was only recoverable by the receiver. As adopting the construction given in the Jones National Bank case to a petition like unto the one in this case, we hold that the petition in this case sets up a right to recover for the individual loss suffered as distinct from the right of the bank, it follows, if we accept the construction given by the Circuit Court of Appeals to the pleadings in the case wherein the judgment relied upon was rendered, that case and this involve different causes of action. But it is insisted that if a correct analysis be made of the facts set out in the previous case the result will be to demonstrate that that case and this are identical, and, therefore, the judgment in the previous case is controlling here. This, however, is but to assert that the previous judgment was wrong, and, therefore, in determining its effect as *res adjudicata* we must treat it as embracing matters which it did not include. To give full force and effect to the judgment we must necessarily exclude those things which the judgment excluded. To hold to the contrary would be to decide that the former judgment must be accepted as correct, and yet it must be extended to controversies which are beyond its reach, because the judgment was wrongfully rendered.

The same judgment must therefore be ordered in each of these cases as was directed to be entered in the Jones National Bank case, viz., as to Mosher and Outcalt, two of the persons named as plaintiffs in the writ of error and citation, the writ of error in each action is dismissed for want of prosecution; as to the other plaintiffs in error, the judgment below in each action is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.